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No. _____

IN THE

Supreme Court of the United States

October Term, 1986

EARL D. JACOBSEN and ERNEST JACOBSEN,
Individually and as Co-Trustees under
Voluntary Liquidation and Dissolution of
Saratoga Distributing Company, and
Ribbon Distributing, Inc.,

Petitioners,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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November, 1986

QUESTION PRESENTED

Whether a state, in exercising its twenty-first amendment powers to regulate its liquor distribution system, may adopt rules and regulations which prohibit beer brewers from engaging in unfair trade practices and apply those rules retroactively to pre-existing contracts between brewers and wholesalers.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Earl D. Jacobsen and Ernest Jacobsen, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above-entitled case on August 29, 1986.

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court is reported at 392 N.W.2d 868 (Minn. 1986), and is printed in the appendix hereto at page A-1. The Order of the Minnesota State District Court certifying the question to the Minnesota Supreme Court is printed in the appendix hereto at page A-18. The Order of the Minnesota State District Court denying Anheuser-Busch's Motion for Dismissal is printed in the appendix hereto at page A-15.

JURISDICTION

The Opinion of the Supreme Court of the State of Minnesota (appendix infra, page A-1) was entered on August 29, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3).

Pursuant to Supreme Court Rule 28.4(c), Petitioners state that 28 U.S.C. §2403(b) may be applicable in that the constitutionality of a state statute was drawn in question in the lower court proceedings. The Attorney General of the State of Minnesota was notified of the pending action, pursuant to Rule 24.04 of the Minnesota Rules of Civil Procedure, but the Attorney General declined to participate.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 10:

> No State shall . . . pass any . . . law impairing the obligation of contracts . . .

United States Constitution, Amendment XXI, Section 2:

> Transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Minnesota Constitution, Article 1, Section 11:

> No . . . law impairing the obligation of contracts shall be passed . . .

The Beer Brewers and Wholesalers Act, Minnesota Statutes, sections 325B.01 to 325B.17, is reprinted in the appendix beginning at page A-40. For the convenience of the Court, three sections are reprinted here in full:

Minnesota Statutes, section 325B.06 (1977):

> No Brewer shall unreasonably withhold consent to any assignment, transfer or sale of the wholesaler's business whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers.

Minnesota Statutes, section 325B.08 (1977):

> If a brewer engages in conduct prohibited under sections 325B.01 to 325B.17, a wholesaler may maintain a suit against the brewer. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under sections 325B.01 to 325B.17, including, but not limited to, declaratory judgment and injunctive relief. The court may, if it finds that the brewer has acted in bad faith in invoking the amendment, termination, cancellation or nonrenewal provisions of sections 325B.01 to 325B.17, or has unreasonably withheld its consent to any assignment, transfer or sale of the wholesaler's agreement, award punitive damages, as well as actual damages, costs and attorneys' fees.

Minnesota Statutes, section 325B.15 (1977):

> The provisions of sections 325B.01 to 325B.17 shall cover agreements in existence on May 28, 1977, as well as agreements entered into after May 28, 1977.

STATEMENT OF THE CASE

Anheuser-Busch, Inc. ("Anheuser-Busch") is a brewer of malt beverages such as Michelob and Budweiser beer. Anheuser-Busch distributes its products by sale to intermediate wholesalers which in turn distribute the products to retailers for sale to consumers. Earl D. Jacobsen and Ernest

Jacobsen ("Jacobsens") are the owners of Saratoga Distributing Company ("Saratoga"), a beer wholesaler in Duluth, Minnesota. In September of 1976, Anheuser-Busch and Saratoga executed an Anheuser-Busch Wholesaler Equity Agreement. The Wholesaler Equity Agreement is reprinted in the appendix hereto, beginning at page A-20. By virtue of the Wholesaler Equity Agreement, Saratoga became the wholesaler of Anheuser-Busch products in the Duluth, Minnesota sales territory.

On May 28, 1977, the Minnesota Beer Brewers and Wholesalers Act ("Act") became law. Minn. Stat. ch. 325B. Since the legislature specifically provided that the Act applied to agreements in existence on the date of enactment, the contractual relationship between Anheuser-Busch and Saratoga became subject to Chapter 325B.

During November of 1977, the Jacobsens negotiated the sale of Saratoga to Ribbon Distributing, Inc. ("Ribbon"), an established beer wholesaler company wholly owned by Kenneth R. Stretar. Ribbon distributed products brewed by some of Anheuser-Busch's competitors. On November 28, 1977, Saratoga submitted to Anheuser-Busch a Request for Approval of Proposed Change in Ownership. Anheuser-Busch denied the Request. Because Anheuser-Busch denied the Request, the sale to Ribbon was lost. The Jacobsens later negotiated a sale of Saratoga to Northern State Distributing, Inc., of Superior, Wisconsin, another wholesaler which already distributed Anheuser-Busch products; however, the purchase price was substantially lower than that offered by Ribbon.

Anheuser-Busch's unreasonable refusal to consent to the sale of Ribbon resulted in an actual loss of approximately $145,000. The Jacobsens and Ribbon commenced this action against Anheuser-Busch, seeking relief on several causes of action. At the time of trial the only cause of action remaining against Anheuser-Busch was the claim that Anheuser-Busch damaged the Plaintiffs by unreasonably withholding consent to the proposed sale in violation of Chapter 325B of the Minnesota Statutes.

At trial, Anheuser-Busch moved to dismiss the Plaintiffs' claims under Chapter 325B on the ground that the retroactive application of Chapter 325B, as mandated by Minnesota Statutes, section 325B.15, unconstitutionally impaired the contractual expectations of the parties created by the Anheuser-Busch Wholesaler Equity Agreement, in violation of the Contract Clauses of the Constitution of the United States and the Constitution of the State of Minnesota. By Order dated August 19, 1985, the State District Court denied Anheuser-Busch's Motion to Dismiss. The Order is reprinted in the appendix at page A-15. By Order dated September 17, 1985, (a copy of which is reprinted in the appendix at Page A-18) the trial court certified the following question to the Minnesota Supreme Court:

Does the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. §§325B.01 *et seq.*, applied retroactively to a pre-existing agreement between a brewer and a wholesaler as mandated by Minn. Stat. §325B.15, unconstitutionally impair the parties' rights and obligations set forth in that pre-existing agreement under Art. I, §10 of the Constitution of the United States and Art. 1, §11 of the Constitution of the State of Minnesota (impairment of contract).

The Minnesota Supreme Court, in an Opinion filed August 29, 1986, answered the certified question in the affirmative.

ARGUMENT

I.

THE MINNESOTA SUPREME COURT'S DECISION DID NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND

This Court has jurisdiction to decide this case because the decision below did not rest on an adequate and independent state ground. In determining whether an independent state ground exists, this Court has stated that the lower court's opinion must contain a "plain statement" that it rests on state ground. *Michigan v. Long*, 463 U.S. 1032, 1042, 1044 (1983);

New York v. Class, _____ U.S. _____, 106 S.Ct. 960, 649 (1986). Accordingly, this Court has consistently held that:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

New York v. Class, _____ U.S. at _____, 106 S.Ct. at 964 (citing *Michigan v. Long*, 463 U.S. at 1040-41).

The Minnesota Supreme Court Opinion in *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868 (Minn. 1986), does not contain the requisite "plain statement" that the decision rested on state ground. Rather, the opinion makes clear that the state court relied on federal constitutional law to analyze the impact of the Contract Clause on the state's twenty-first amendment powers. Throughout its opinion, the *Jacobsen* court mentions the Minnesota Constitution only in direct conjunction with the United States Constitution—perhaps because the Minnesota constitutional provision restricting impairment of contract is virtually identical to the Contract Clause of the United States Constitution.[1] The absence of an independent discussion of the state constitution has been viewed by this Court as convincing evidence of the lack of an adequate and independent state ground. *Class*, _____ U.S. at _____, 106 S.Ct. at 964.

Rather than providing the requisite plain statement of adequate and independent state ground, the Minnesota Supreme Court's decision relied solely on federal cases which analyze

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[1] U.S. Const. art. I, § 10, provides: "No State shall . . . pass any . . . law impairing the obligation of contracts." Minn. Const. art. 1, § 11 states: "No . . . law impairing the obligation of contracts shall be passed . . . ." *See Jacobsen v. Anheuser Busch*, 392 N.W.2d 868, 872 fn. 10 (Minn. 1986).

federal constitutional doctrine. Although the state court cited its decision in *Christensen v. Minneapolis Municipal Employees Retirement Board,* 331 N.W.2d 740 (Minn. 1983), that decision merely adopts the United States Supreme Court's three-part test enunciated in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400 (1983), for analysis of Contract Clause cases. The *Christensen* court's discussion of the federal constitutional prohibition on impairment of contracts and its exclusive reliance on federal decisions makes it clear that the state court decided the Contract Clause issue in a manner it felt was compelled by federal law. Absent a "plain statement" of independent state ground and given the lower court's reliance on federal law, the United States Supreme Court should review the Minnesota Supreme Court's decision.

II.
THE IMPACT OF THE CONTRACT CLAUSE ON A STATE'S TWENTY-FIRST AMENDMENT RIGHTS HAS NEVER BEEN DIRECTLY ADDRESSED

The impact of the Contract Clause of the United States Constitution or a similar clause of a state constitution on a state's twenty-first amendment rights has never been addressed by the Supreme Court of the United States or any federal circuit court of appeals. The relationship between these constitutional rights must be clarified to facilitate uniform interpretation of state laws which affect businesses engaged in interstate commerce.

The twenty-first amendment prohibits "[t]he transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . ." U.S. Const. amend. XXI. The twenty-first amendment "gives the States wide latitude to regulate the importation and distribution of liquor within their territories." *Brown - Forman Distillers v. New York Liquor Authority,* 476 U.S. _____, _____, 106 S.Ct. 2080, 2087 (1986). State regulation of the importation and

distribution of liquor frequently brings the twenty-first amendment into competition with other provisions of the Constitution. When this has occurred, this Court has stated that the twenty-first amendment is "part of the same constitution," and each provision must be "considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984). The Court's task is to reconcile the interests protected by the competing constitutional provisions. *Brown - Forman*, 476 U.S. at _____, 106 S.Ct. at 2087.

This Court has considered the relationship of the twenty-first amendment to other federal constitutional provisions and found the states' power under the twenty-first amendment to be broad. For example, this Court has held that the twenty-first amendment empowers a state to regulate and impair rights guaranteed under the first and fourteenth amendments. *New York Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). As a further example, this Court has ruled, notwithstanding challenges under the Commerce Clause, that the twenty-first amendment grants a state broad power to regulate the transportation, sale and distribution of liquor within its borders provided the regulation does not extend to liquor distribution in other states. *Brown - Forman*, 476 U.S. at _____, 106 S.Ct. at 2087. Now this Court has an opportunity to clarify the perimeters of the states' powers under the twenty-first amendment where those powers have been challenged under the Contract Clause.

In 1977, the Minnesota Legislature, exercising its power under the twenty-first amendment to regulate the importation and sale of alcoholic beverages, enacted the Beer Brewers and Wholesalers Act. Minn. Stat. ch. 325B. The Act regulates the system or methods by which beer brewers are allowed to import, distribute and sell intoxicating beverages in the State of Minnesota by prohibiting certain unfair or discriminatory trade practices.

Among the unfair trade practices proscribed by the Act are price fixing by brewers (Minn. Stat. §325B.09), retaliatory

action by a brewer against a wholesaler who complains of a brewer's violations of state or federal regulations (Minn. Stat. §325B.10), discrimination among wholesalers in business dealings (Minn. Stat. §325B.12), restriction of free association among wholesalers (Minn. Stat. §325B.16), interference with a wholesaler's right to sell a competitor's products (Minn. Stat. §325B.09), inducement and coercion by brewers (Minn. Stat. §325B.02), and arbitrary and capricious refusal to consent to the transfer of a wholesaler's business (Minn. Stat. §325B.06).

The last provision (Minn. Stat. §325B.06) is significant because it directly affects the system employed by brewers to import beer into Minnesota. Brewers utilize a system of wholesalers to import their products into Minnesota for sale to retailers. The relationship between the brewers and wholesalers has been the subject of private contracts, such as Anheuser-Busch's Wholesaler Equity Agreement. A wholesaler cannot sell Anheuser-Busch products unless it agrees to the conditions of the Wholesaler Equity Agreement dictated by Anheuser-Busch.

The Wholesaler Equity Agreement reserves to Anheuser-Busch the unrestricted right to disapprove the sale of any wholesaler's business. If Anheuser-Busch disapproves a sale, and if the sale is thereafter consummated, the license to distribute Anheuser-Busch products is automatically terminated. *See* Wholesaler Equity Agreement §4, page A-26. This provision, if applied without reasonable restraints, effectively allows Anheuser-Busch to prevent a wholesaler from selling his or her business to any buyer of his or her choice. It gives Anheuser-Busch *de facto* power to select the purchaser of a wholesaler's business and, thus, effectively control the price of sale. Since the value of any beer wholesaler's business is derived in large part from the brands of beer it is licensed to distribute, wholesalers such as Saratoga can lose their substantial business investment if this "disapproval clause" is exercised arbitrarily and capriciously.

Minnesota Statutes, section 325B.06 codifies the general rule in Minnesota—that contracts are to be subject to reason-

able interpretation[2]—by imposing reasonable restrictions on a brewer's power to disapprove the sale of a wholesalership. Section 325B.06 prohibits a brewer from "unreasonably withholding consent" to a sale of a wholesaler's business "whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers." Minn. Stat. §325B.06.

The Act contains legal and equitable remedies to insure enforcement of the Act and elimination of the unfair trade practices proscribed by the Act. Minn. Stat. §325B.08. To insure that Chapter 325B would be applied uniformly to all wholesalers operating in the state, rather than just the new wholesalers, the Minnesota Legislature specifically provided that Chapter 325B would apply retroactively to all agreements in existence on May 28, 1977, the effective date of the Act. Minn. Stat. §325B.15.

Taken as a whole, the Act is a prime example of regulation of a state's system for importation and sale of beer within the state. Because "the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), legislation regulating trade practices among brewers and wholesalers is appropriate under the twenty-first amendment.

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[2]There is a covenant of good faith and fair dealing implied in every contract. *W.K.T. Distributing Co. v. Sharp Electronics*, 746 F.2d 1333, 1337 (8th Cir. 1984). *See also* Minn. Stat. § 336.1-203 (Minnesota's codification of the Uniform Commercial Code provision requiring good faith in the performance or enforcement of contracts.)

III.
A CONFLICT EXISTS BETWEEN STATE COURTS WHICH HAVE ADDRESSED THE IMPACT OF THE CONTRACT CLAUSE ON A STATE'S TWENTY-FIRST AMENDMENT RIGHTS

Understanding the scope of a state's right to exercise its twenty-first amendment power, where the state has determined that it is in the public interest to regulate all (new and existing) contractual relationships, is critical to the preservation of states' rights under the twenty-first amendment. Only two state supreme courts have considered the impact of the Contract Clause on a state's twenty-first amendment powers.[3] Each court reached a different conclusion.

In the first case, *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 479 A.2d 1191 (1984), the Connecticut Supreme Court broadly interpreted the state's power under the twenty-first amendment. The Connecticut Supreme Court construed a state statute which retroactively reduced the probationary period during which a liquor manufacturer (the equivalent of a beer brewer) could terminate a liquor distributor (the equivalent of a beer wholesalership) without establishing "just cause." This probationary period was reduced from 24 months to six months. *Id.* at _____, 479 A.2d at 1195. In other words, after the business arrangement had been in effect for six months, the manufacturer could not terminate the distributor except for "just cause." *Id.* Notwithstanding the impact on existing contracts, the Connecticut Legislature retroactively reduced the durational period to pro-

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[3] Two other state supreme courts have considered the effect of the Contract Clause on a franchise law which applied to liquor distributors. *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19 (Del. Supr.), *cert. denied*, 404 U.S. 873 (1971); *United States Brewer's Ass'n. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974). The impact of the twenty-first amendment was not considered in either case, rendering both cases of no precedential value to the specific issue raised in this Petition.

tect three Connecticut distributors which were under contract for more than six but less than 24 months and were threatened with termination. *Id.*

The Connecticut Court carefully analyzed the Connecticut statute under the accepted Contract Clause methodology. Applying the three-step test set out in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983),[4] the Court concluded that, under the twenty-first amendment, state regulation of the liquor industry serves a significant and legitimate purpose. *Schieffelin*, 194 Conn. at _____, 479 A.2d at 1201. It found that enactment of statutory conditions under which liquor distributors may be terminated is an acceptable method of regulating the liquor industry by regulating contracts between elements of the state's liquor distribution system. *Id.* Further, the court held that the Connecticut statute served the equally important public purpose of prevent-

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[4] In *Energy Reserves*, this Court set out a three-part test to determine whether there has been a violation of the Contract Clause:

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
>
> * * *
>
> If the State regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.
>
> * * *
>
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the "rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."

Energy Reserves, 459 U.S. at 411-12 (citations omitted). The Minnesota Supreme Court first recognized the three-part test of *Energy Reserves* in *Christensen v. Minneapolis Municipal Employees Retirement Bd.*, 331 N.W.2d 740 (Minn. 1983).

ing out-of-state manufacturers from dominating Connecticut wholesalers through their contracts. *Id.* Based in large part on its twenty-first amendment analysis, the Connecticut Supreme Court upheld retroactive application of the statute against the Contract Clause challenge.

In the second case, *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868 (Minn. 1986), the Minnesota Supreme Court minimized the importance of the twenty-first amendment when it held that Minnesota's Beer Brewers and Wholesalers Act violated the Federal and Minnesota Constitutions' Contract Clauses. The court admitted that the twenty-first amendment was "relevant" but concluded, without explanation, that the twenty-first amendment did not give the state legislature the power to impair pre-existing contracts between beer brewers and wholesalers. *Id.* at 873.

The United States Supreme Court is not bound by the conclusion of the Minnesota Supreme Court. "The findings and conclusions of [state] courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment." *Midcal Aluminum*, 445 U.S. at 111.

In addition to virtually ignoring the twenty-first amendment, the Minnesota Supreme Court also erred in its application of this Court's rulings on the method for analysis of Contract Clause cases. This Court explained in *Energy Reserves* that, in determining whether there has been a substantial impairment of contract, a court must consider "whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves*, 459 U.S. at 411. Despite the Court's guidance, the Minnesota Supreme Court gave little weight to the Minnesota Legislature's pervasive prior regulation of the state's liquor industry. *Jacobsen*, 392 N.W.2d at 873-74. Second, the Minnesota court ignored the state's history of enacting regulations prohibiting unfair trade practices of the type proscribed by Chapter 325B.

In 1973, prior to the parties' execution of the Wholesalers Equity Agreement, the State of Minnesota enacted a law prohibiting unfair trade practices in franchising. That law and its regulations required "good cause" for terminating franchises and prohibited unreasonable refusal to consent to the sale of a franchise. Minn. Reg. S. Div. 1714 (1975)[5]. This is the precise type of provision in Chapter 325B challenged by Anheuser-Busch in this case.

Despite the history of regulation of the liquor industry and regulation of unfair trade practices in commercial transactions, the Minnesota Supreme Court concluded that the

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[5]The rules and regulations promulgated pursuant to the grant of authority in Minnesota Statutes, §80C.14 (see appendix, page A-46) of the Minnesota Franchise Law provide in pertinent part:

> All franchise contracts or agreements and any other device or practice of a franchisor shall conform to the following provisions. It shall be "unfair and inequitable" for any person to:
>
> * * *
>
> (f) Terminate or cancel a franchise except for good cause which shall be defined as failure by the franchisee substantially to comply with those reasonable requirements imposed upon him by the franchise including, but not limited to, (1) the bankruptcy or insolvency of the franchisee; (2) assignment for the benefit of creditors or similar disposition of the assets of the franchise business; (3) voluntary abandonment of the franchise business; (4) conviction or a plea of guilty or no contest to a charge of violating any law relating to a franchise business; or (5) any act by or conduct of the franchisee which materially impairs the good will associated with the franchisor's trademark, tradename, service mark, logotype or other commercial symbol; or
>
> * * *
>
> (h) Unreasonably withhold consent to any assignment, transfer, or sale of the franchise whenever the franchisee to be substituted meets the present qualifications and standards required of the franchisees of the particular franchisor;

Minn. Reg. S. Div. 1714 (1975) (reprinted in its entirety in the appendix at page A-46). The language of Paragraph (h) is almost identical to section 325B.06 of the Beer Brewers and Wholesalers Act, which was enacted two years later.

Wholesaler Equity Agreement drafted by Anheuser-Busch had been substantially impaired because the Beer Brewers and Wholesalers Act contained enforcement provisions which exposed Anheuser-Busch to claims for damages. This analysis suggests that a party, by private contract, can avoid otherwise legitimate state regulation when the regulation includes provisions for enforcement and damages for violations. As the United States Supreme Court long ago stated, "[o]ne whose rights . . . are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.).

Moreover, the Minnesota Court's analysis skirted the issue of anticipated future regulation. The Court gave no weight to a significant section of the Wholesaler Equity Agreement (drafted by Anheuser-Busch) which provides:

> **16. COMPLIANCE WITH LAW**
> The provisions of this Agreement are subject to and shall be governed by the laws of the jurisdiction in which the Wholesaler's principal place of business is located. The illegality or unenforceability of any provision of this Agreement shall not operate to impair the legality or enforceability of any other provision of this Agreement. *The laws, rules and regulations of the jurisdiction in which Wholesaler conducts its business, to the extent that they may now or* ***hereafter*** *bear upon the* ***contractual relationship*** *between Wholesaler and Anheuser-Busch, are hereby incorporated in this Agreement and made a part hereof.* If required by the laws of a state, Anheuser-Busch and all Anheuser-Busch wholesalers in such state may enter into an amendment of this Agreement for the sole purpose of complying with such laws, and such amendment shall not constitute a breach of the provisions of Paragraph 13.

Wholesaler Equity Agreement, page A-35 (emphasis added). As Justice Yetka noted in his Dissent, this provision of the Agreement indicates that the parties agreed to abide by future

amendments to the liquor laws of Minnesota and their contract automatically would be amended to incorporate those new laws. *Jacobsen*, 392 N.W.2d at 875-76. In view of the history of regulation of the Minnesota liquor industry and section 16 of the Wholesaler Equity Agreement, no substantial impairment of contract exists.

In the absence of substantial impairment of contract, the Minnesota Supreme Court should have concluded its analysis. Instead the state court continued by applying the second step of the *Energy Reserves* test. In doing so, the state court again ignored the pervasive power accorded a state under the twenty-first amendment.

The second step of the *Energy Reserves* test involves a determination of whether the state legislature believes there is a significant and legitimate public purpose for the regulation. *Energy Reserves*, 459 U.S. at 411. The requirement of a legitimate public purpose guarantees that the state is exercising its police power, rather than providing a benefit to special interests. *Id.* at 412. The state's exercise of its twenty-first amendment powers is an exercise of its police power. In fact, those powers extend beyond the ordinary police power.

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals.

California v. LaRue, 409 U.S. 109, 114 (1972). When a state enacts liquor control legislation, the state is exercising its police power; therefore, such legislation satisfies the requirement of a legitimate public purpose.

In *Manigault v. Springs*, 199 U.S. 473 (1905), the United States Supreme Court emphasized that legislative protection of beer wholesalers operates as a public purpose. In

Manigault, Petitioners alleged a 1903 state statute was unconstitutional because it impaired an 1898 contract. In its opinion the Court said:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, *all of which are subject to impairment by a change of policy on the part of the state*, prohibiting the establishment or continuance of such traffic; in other words, that *parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.*

Id. at 480 (emphasis added). Legislation proscribing unfair trade practices by beer brewers serves a public purpose. It is the prerogative of the state legislature to determine what constitutes public purpose. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 47 (1966).

The state court's analysis ignores a mathematical fact: there are a relatively small number of beer wholesalers in the State of Minnesota. Regulation of the beer industry necessarily affects a small number of entities, thereby making such legislation appear to be special interest legislation. Whether legislation has a legitimate public purpose is measured by the resultant good—not by the number of entities affected. Beer

wholesalers are citizens of the state; they, like franchisees, are entitled to protection from unfair trade practices despite their small numbers. "Legislative reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Seagram*, 384 U.S. at 51. Regulation of a unique industry such as the beer industry, of the type contained in Minnesota's Beer Brewers and Wholesalers Act is a legitimate exercise of twenty-first amendment powers to protect members of the public from unfair trade practices.

The conflict between the decisions of the Minnesota and Connecticut Supreme Courts leaves the states' powers under the twenty-first amendment in doubt. Under the Minnesota Supreme Court's interpretation, liquor manufacturers can preclude state regulation of the liquor distribution system by entering into private contracts with wholesalers. They can claim the Contract Clause overrules the state's power under the twenty-first amendment. This Court must resolve this significant conflict between the Contract Clause and the twenty-first amendment.

Dated: November 24, 1986.

Respectfully Submitted,
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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT
C7-85-2105

Court of Appeals

Kelley, J.
Dissenting, Yetka, J.

Earl D. Jacobsen, et al.,

Respondents,

vs.

Anheuser-Busch, Incorporated,
Appellant.

Filed August 29, 1986
Wayne Tschimperle
Clerk of Appellate Courts

[392 N.W.2d 869]

SYLLABUS

Minn. Stat. § 325.01 applied retroactively to a preexisting agreement between a brewer and a wholesaler, as mandated by Minn. Stat. § 325B.15, unconstitutionally impairs the rights and obligations of the parties set forth in that preexisting agreement.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

KELLEY, Justice.

This case comes to us as a certified question. The question is: Does the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. §§ 325B.01, *et seq.*, applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. § 325B.15, unconstitutionally impair the parties' rights and obligations set forth in that

preexisting agreement under art. I, § 10 of the Constitution of the United States and art. 1, § 11 of the Constitution of the State of Minnesota? The trial court denied Anheuser-Busch's motion to dismiss an action commenced by a wholesaler and its vendee seeking damages under Minn. Stat. § 325B.01 *et seq.* In so doing, it ruled that the Act did not unconstitutionally impair a contract between

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Anheuser-Busch and its wholesaler, and certified the constitutional question as important and doubtful under Minn. R. Civ. App. P. 103.03(h).[1] We answer the certified question in the affirmative and reverse.

Anheuser-Busch, Inc., appellant, is a brewer of malt beverages such as Michelob and Budweiser beer.[2] Its products are marketed through intermediate wholesalers who distribute the products to retailers for sale to consumers. In 1976, Earl D. and Ernest R. Jacobsen (Jacobsens) owned Saratoga Distributing Company (Saratoga). In September of that year, appellant and Saratoga entered into a written contract entitled "Anheuser-Busch Wholesaler Equity Agreement." Thereafter, and subject to the terms of that contract, Saratoga became the wholesaler for Anheuser-Busch products in the Duluth sales territory. Because Anheuser-Busch was cognizant of the fact that a wholesalership could significantly affect sales of its products, it reserved to itself the right to approve or disapprove a change in ownership of the wholesale distributorship. Moreover, Anheuser-Busch under the contract had the right to terminate the contract if it did not approve an ownership transfer.[3]

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[1] The court of appeals certified the question to this court and requested accelerated review under Minn. R. Civ. App. P. 118, subd. 1 and Minn. Stat. § 480A.10, subd. 2(b). We granted the request.

[2] The parties have agreed to a statement of the record pursuant to Minn. R. Civ. App. P. 110.04.

[3] Contract provisions relevant to change in ownership provide:

Approximately nine months after the execution of the contract, the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. ch. 325B.01 *et seq.*, became effective. Section 325B.06 of the Act provides:

> No brewer shall unreasonably withhold consent to any assignment, transfer or sale of the wholesaler's business whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers.

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4. OWNERSHIP OF WHOLESALER:
Although this is a personal service agreement and the participation of Manager is vital to both parties, the ownership of Wholesaler is also important because it is the owner or owners who have the right to establish basic policies and have the responsibility of providing financing, manpower, equipment and facilities for the effective operation of the business. Moreover, Anheuser-Busch has always looked to the owner (even though he may not be the Manager) of a wholesalership to maintain an active interest in the business, to be knowledgeable at all times of the operation and to regularly supervise the work of the Manager. Therefore, because the identity of the owner(s) could also have a significant effect on the sale of the Anheuser-Busch Products, the parties agree as follows:

(a) Unless Wholesaler shall have obtained the prior written approval of Anheuser-Busch to a proposed change in the ownership of Wholesaler under the provisions of the following subparagraph (b), this Agreement shall terminate whenever there is a change in the ownership of Wholesaler which results in a change in the control of Wholesaler's business. * * *

(b) Wholesaler shall have the right to request from Anheuser-Busch written approval in advance of any proposed transfer of ownership interest. * * * [I]f the Request for Approval of Proposed Change in Ownership furnishes Anheuser-Busch with sufficient information to enable it to pass upon the proposed change in ownership, then within 30 days after the Request form has been received, Anheuser-Busch shall notify Wholesaler in writing whether it approves or disapproves the proposed change in ownership; (iii) in the event Anheuser-Busch decides that it needs additional information from Wholesaler in order to determine whether to approve the proposed change in ownership, * * * [w]holesaler shall submit such additional information as promptly as possible; (v) within 30 days after the date on which all such

The Act is made expressly retroactive.[4] Other sections of the Act provide substantial penalties for violation of Section 325B.06.[5] Additionally, the Act authorizes the court to grant equitable relief, award punitive damages and allow attorney fees.[6] It also places other restrictions on brewers vis-a-vis wholesalers.[7]

Approximately six months after the effective date of Minn.

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additional information has been received, Anheuser-Busch shall notify Wholesaler in writing whether it approves or disapproves the proposed change in ownership. * * *

* * * *

16. COMPLIANCE WITH LAW:

The provisions of this Agreement are subject to and shall be governed by the laws of the jurisdiction in which Wholesaler's principal place of business is located. * * * The laws, rules and regulations of the jurisdiction in which Wholesaler conducts its business, to the extent that they may now or hereafter bear upon the contractual relationships between Wholesaler and Anheuser-Busch, are hereby incorporated in this Agreement and made a part hereof. * * *

[4] Section 325B.15 reads:

The provisions of sections 325B.01 to 325B.17 shall cover agreements in existence on May 28, 1977, as well as agreements entered into after May 28, 1977.

[5] Section 325B.07 providing for penalties, insofar as relevant, reads:

Subdivision 1. Any brewer which * * * unreasonably withholds consent to any assignment, transfer or sale of a wholesaler's business, shall pay the wholesaler reasonable compensation for the value of the wholesaler's business with relationship to the terminated brand or brands. The value of the wholesaler's business shall include, but not be limited to, its good will, if any.

[6] Section 325B.08, in part, provides:

The court may grant equitable relief * * * including, but not limited to, declaratory judgment and injunctive relief. The court may, if it finds that the brewer has * * * unreasonably withheld its consent to any assignment, transfer or sale of the wholesaler's agreement, award punitive damages, as well as actual damages, costs and attorneys fees.

[7] For example, a brewer is prohibited from signing an agreement with more than one wholesaler in a sales territory. *See* Section 325B.03.

Stat. ch. 325B, the Jacobsens negotiated an agreement with Kenneth Stretar, the sole owner of Ribbon Distributing, Inc. (Ribbon), whereby Ribbon would purchase Saratoga. The agreement was contingent upon Ribbon's ability to obtain the consent of Anheuser-Busch to handle its products.

After Saratoga had submitted to Anheuser-Busch a formal request for approval of the proposed ownership change, Anheuser-Busch, citing three reasons, disapproved the proposed transfer.[8]

Thereafter, the Jacobsens and Ribbons sued appellant. Following dismissals of some counts, the only claims remaining in 1985 charged Anheuser-Busch with unreasonable conduct prohibited by Minn. Stat. §§ 325B.01 to 325B.17 (1980).[9]

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[8]The declination was by letter dated January 18, 1978 from Anheuser-Busch's vice-president of sales operations. Insofar as relevant, it read:

> First, in view of the number of brands currently represented by Ribbon, we fear that the merger of your organization would result in a near monopoly in the wholesale beer market in Duluth. The resulting proliferation of brands would preclude the merchandising and marketing effort which we believe is necessary to improve our market position there.
>
> Secondly, our contact with retailers and others close to the Duluth beer market indicates that Mr. Stretar is not well regarded by area retailers. As you know, the maintenance of strong wholesaler-retailer relationships is, in our view, critical to the successful marketing of Anheuser-Busch products.
>
> Additionally, it is our opinion that the operational plan submitted by Mr. Stretar is wholly inadequate. The marketing strategy which it sets forth would not give our products adequate representation in the Duluth market. For these reasons, we do not feel that it would be in our best interests to approve the transfer of ownership of your company to Mr. Stretar. Please understand that this disapproval is motivated solely by a sincere desire to insure maximum representation of Anheuser-Busch brands in the Duluth market.

[9]In the initial complaint, Jacobsens sued individually and as co-trustees under voluntary proceedings for the liquidation and dissolution of Saratoga. Originally the complaint contained four counts. Prior to trial, the court dismissed the Jacobsens' individual claims and a count for

Respondents sought actual and punitive damages plus attorney fees. Anheuser-Busch moved to dismiss. It claimed the retroactive application of the statute, Minn. Stat. § 325B.15 (1984), unconstitutionally impaired the rights and obligations of the parties to the contract executed prior to the Act's effective date under U.S. Const. art. I, § 10 and Minn. Const. art. 1, sec. 11. After "reluctantly" concluding that the impairment of contract did not rise to constitutional dimension, the trial court denied the motion but certified the question as important and doubtful.

We commence our analysis of the issues raised by referring to certain rules applicable

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in a case where the constitutionality of a legislative act is challenged. Since the certified question is solely a legal one, we need to give no deference to the trial court decision. *Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). However, every legislative enactment comes to the court with a presumption in favor of its constitutionality. *Federal Distillers, Inc. v. State*, 304 Minn. 28, 39, 229 N.W.2d 144, 154 (1975). Therefore, the burden rests with the challenger to demonstrate beyond a reasonable doubt that the challenged Act violates a constitutional provision. *Id.*

Here, the sections of the Minnesota Beer Brewers and Wholesalers Act are challenged by Anheuser-Busch as violating the contract clauses of both the Constitutions of the United States and of Minnesota.[10] Though the language of the

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tortious interference with contractual relations. A count alleging breach of contract was withdrawn by respondents before trial.

[10] U.S. Const. art. I, § 10 provides: "No State shall * * * pass any * * * law impairing the obligation of contracts." Minn. Const. art. 1, § 11 states: "No * * * law impairing the obligation of contracts shall be passed * * *."

contract clauses in both Constitutions is absolute, courts have indicated the prohibitions of such contract clauses must be accommodated to the inherent police power of the state "to safeguard the vital interests of its people." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983), quoting *Home Building & Loan Associates v. Blaisdell*, 290 U.S. 398, 434 (1934). In *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), we noted and applied the three-part test enunciated in *Energy Reserves*, 459 U.S. at 411-13, to determine whether a contractual impairment was unconstitutional. Using the *Energy Reserve* analysis, a court initially considers whether the state law has, in fact, operated as a substantial impairment of a contractual obligation. The severity of the impairment increases the level of scrutiny to which the legislation is subjected. *See Christensen* 331 N.W.2d at 750-51. Secondly, if a substantial impairment exists, those urging the constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation. *Id.* Finally, the legislature's action is examined in the light of this public purpose to see whether the adjustment of the rights and liabilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the law's adoption. *Id.*[11]

All parties concede that in the wholesale equity agreement with Saratoga, Anheuser-Busch reserved to itself the unrestricted right to approve or disapprove any proposed change in the ownership of Saratoga. The Minnesota Beer Brewers

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[11] A suggestion as to the nature and scope of the "significant and legitimate" public purpose is stated by the Eighth Circuit: "A serious alteration of the terms of a contract resulting from state legislation is permissible if, but only if, the legislation is necessary to meet a *broad* and *pressing* social or economic need, if the legislation is reasonably adopted for the solution of the problem involved, and if it is not over broad or over harsh." *White Motor Corp. v. Malone*, 599 F.2d 283, 287 (8th Cir. 1979), *aff'd.* 444 U.S. 911 (1979) (emphasis supplied).

and Wholesalers Act, specifically made retroactive by the legislature, prohibits a brewer from "unreasonably withholding consent" to a sale of a wholesaler's business "whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers." Minn. Stat. § 325B.06 (1984). From this language Anheuser-Busch contends that the Act has severely impaired its reasonable contractual expectation by stripping it of its contractual right to freely exercise its business judgment in deciding whether to approve or disapprove a franchise transfer. As the result, Anheuser-Busch points out, it now faces a judicial determination on the reasonableness of its business decision. Accordingly, it argues, the Act replaces its unfettered business discretion with statutory standards, the violation of which

[392 N.W.2d 873]

makes the company potentially liable for unusual compensatory damages as well as punitive damages, costs, and attorney fees.

To the contrary, the wholesalers assert that the contractual impairment at best was minimal, first, because the Act merely requires a brewer to be reasonable in withholding consent to a transfer of the franchise. Secondly, they assert Anheuser-Busch's reasonable contractual expectations could not have been thwarted given the extreme regulation of the liquor industry in Minnesota. They note the broad police powers given to the states to regulate traffic in liquor under the U.S. Const. amend. XXI, § 2, and likewise cite numerous provisions of the Intoxicating Liquor Act, Minn. Stat. § 340A *et seq.* Accordingly they claim Anheuser-Busch should have anticipated statutory changes regulating termination and transfer of wholesale franchises.[12]

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[12] The wholesalers also argue Anheuser-Busch could reasonably have anticipated the state's franchise laws, Minn. Stat. ch. 80C, would, in time, be applied to the brewer-wholesaler relationship. Section 80C.14

In ascertaining the scope of permissible contractual impairment, courts using the *Energy Reserves* approach will consider whether the industry involved has been regulated in the past. *See, e.g., Energy Reserves*, 459 U.S. at 411. Without doubt, states possess large powers to regulate not only the importation of liquor from other jurisdictions, but also its intrastate distribution. *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980); *State Board v. Young's Market Co.*, 229 U.S. 59 (1936). Nevertheless, while the 21st amendment to the United States Constitution and liquor industry regulations contained in state statutes and regulations may be relevant to the inquiry, they are not dispositive. For example, in *Midcal*, the Supreme Court of the United States in striking down California's wine pricing system as violating the Sherman Act commented:

> Both the Twenty-first Amendement and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Midcal, 445 U.S. at 109, quoting *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964). *See also Craig v. Boren*, 429 U.S. 190 (1976) (state statute on beer sales struck on equal protection grounds). Other cases have likewise clearly demonstrated that the 21st amendment does not give the states carte blanc to override other federal constitutional rights. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *California v. LaRue*, 409 U.S. 109 (1972); *George Benz Sons, Inc. v. Erickson*, 227 Minn. 1, 34 N.W.2d 725 (1948); *Sail'er Inn, Inc. v.*

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of the Franchise Act prohibits unfair practices and requires "good cause" terminations. That a company should foresee a legislature's expansion of a law seems highly speculative. For example in 1984, the legislature repealed section 80C.14 [*sic*] effective July 1, 1986. 1984 Minn. Laws, ch. 444, § 4. Thus the question is raised whether Anheuser-Busch should have similarly anticipated a repeal of this provision of the Franchise Act.

Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971). *See also Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W.2d 144 (1975).

While Anheuser-Busch acknowledges that states have broad regulatory authority over the importation and distribution of liquor within their boundaries, it argues nonetheless that Anheuser-Busch could not reasonably anticipate the adoption of chapter 325B because Minnesota had never previously attempted to regulate a brewer's contractual right to disapprove a wholesaler's proposed change of ownership.[13]

[392 N.W.2d 874]

Particularly it asserts that even if it be conceded the state has the power to enact legislation regulating the terms of distributor contracts, there exists no justification sufficient to permit its retroactive application so as to impair contracts entered into antecedent to the effective date of the legislation.

The courts of several sister jurisdictions which have considered somewhat similar statutes or regulations which attempt to proscribe terminations or transfers of this nature have held such attempts to violate impairment of contract clauses of federal or state constitutions. *See, e.g., Globe Liquor Co. v. Four Roses Distiller's Co.*, 281 A.2d 19 (Del. Supr. 1971) (statute invalid as impairment of obligation of contract

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[13] Respondents contend that Anheuser-Busch could reasonably anticipate legislation in the nature of chapter 325B because the agreement contained a provision in the contract reading, "The laws, rules and regulations of the jurisdiction in which wholesaler conducts his business to the extent that they may now or hereafter bear upon the contractual relationship between wholesaler and Anheuser-Busch is hereby incorporated in this agreement and made a part hereof." Reading this provision in historical context, however, makes clear that this provision affects the relationship between Anheuser-Busch and Saratoga insofar as it bears on duties, prohibitions, etc. of each relative to the laws governing the marketing of beer in Minnesota.

because of substantive changes the Act made in the rights and obligations of a distributor's contract); *United States Brewers' Association v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974) (statute declared unconstitutional invasion of personal and property rights). Other jurisdictions have sustained the validity of similar statutes by holding the legislative enactments were not applicable to contracts in existence at the effective date of the statute, or in other words that they were not retroactive. *See, e.g., Superior Motors, Inc. v. Winnebago Industries, Inc.*, 359 F.Supp. 773 (D.S.C. 1973); *AFA Distributing Co., Inc. v. Pearl Brewing Company*, 470 F.2d 1210 (4th Cir. 1973); *Wipperfurth v. U-Haul Co. of Western Wisconsin*, 101 Wis.2d 586, 304 N.W.2d 767 (1981).

Absent Minn. Stat. ch. 325B with its retroactivity provision, Anheuser-Busch's disapproval of the transfer of the wholesale agreement would have afforded no legal recourse to Saratoga or Ribbon. The fact the disapproval gave rise to no liability based upon the contract is evidenced by respondents' voluntary withdrawl of the contract claim. Instead of being able to invoke a contract provision that was legal under the law at the time the contract was executed, the brewer now faces a trial based solely on claimed violation of the Minnesota Beer Brewers and Wholesalers Act with a measure of damages nonexistent under the prior contract law, plus possible exposure to punitive damages not available under prior contract law, *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 52 (Minn. 1983) (punitive damages for breach of contract are not available under either common law or Minn. Stat. § 549.20), plus an award of attorney fees normally not heretofore recoverable in this type of action, *Barr/Nelson*, 336 N.W.2d at 53; *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981) (Both cases cite that this court has "long held that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery."). In our view this indeed constitutes a substantial impairment.

Nevertheless, even if the Act constitutes a substantial impairment of contract, if there exists a significant and legitimate purpose behind the statute such as "remedying of a broad and general social or economic problem," the Act may yet be sustained because the successful establishment of the existence of a legitimate public purpose serves to provide evidence that the state in enacting the regulation was exercising its police power instead of providing a benefit to special interests. *Energy Reserves*, 459 U.S. at 411-12.

Here, however, there exists absolutely no showing that the disruption of the contractual expectations of Anheuser-Busch and Saratoga was necessary to meet any important, broad, and general economic or social problem. Instead, the Minnesota Beer Brewers and Wholesalers Act has all the earmarks of narrow special

[392 N.W.2d 875]

interest legislation devoid of any broad public purpose. Since 1973 in Minnesota it has been the policy of this state expressed through legislative enactment that exclusive wholesale distributorships be abolished to meet the social end of elimination of monopolistic practices and to promote price competition. 1973 Minn. Laws 664 § 3.[14] *See Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W.2d 144 (1975). Likewise, the Cash Beer Law, Minn. Stat. § 340.405 (1980), which prohibits brewers and wholesalers from extending credit to retailers of intoxicating malt liquors was addressed to the same

[14] This section is now coded in Minn. Stat. ch. 340A (1985 Supp.) known as the Intoxicating Liquor Act. In chapter 340A.307, that Act requires all importers to offer for sale on an equal basis to all licensed wholesalers all intoxicating liquors brought into the state. The Minnesota Beer Brewers and Wholesalers Act effectively carves out an exception to the liquor act by disallowing dual distribution of a particular brand within a sales territory. *See* Minn. Stat. § 325B.03 (1984). *See also* Minn. Stat. § 645.26, subd. 1 (if irreconcilable provisions, special provision shall prevail and be construed as exception to general provision).

general social policy of prevention of vertical integration of the intoxicating malt beverage industry, thereby promoting competition and restricting monopolistic market power. *Haskell's, Inc. v. Sopsic*, 306 N.W.2d 555 (Minn. 1981). In contrast to these statutes reflecting this anti-monopolistic public policy, the Minnesota Beer Brewers and Wholesalers Act on its face is anti-competitive, contrary to the long-standing public policy of the state. Instead, it appears to be primarily special interest legislation in favor of the wholesaler distributors. Indeed, an examination of the legislative history reveals that this legislation arose not in response to any broad and general social or economic problem, but rather at the instigation and promotion of beer distributors. The prime arguments of sponsors for its enactment on the floors of the legislature demonstrate that this was an act promoted by and to serve wholesale beer distributors.[15]

We can ascertain "no significant or legitimate public purpose" in the Act. While it may remedy a perceived problem of beer wholesalers, it was obviously not intended to remedy a "broad and general social or economic problem" contemplated by the language of *Energy Reserves*. It should be kept in mind, however, that the issue here is not whether the legislature could regulate prospectively contracts of this nature, but rather whether the statute can be retroactively applied absent a "significant and legitimate public purpose." We address no other issue than that in this opinion.

Having ruled that there was no "significant and legitimate public purpose" to be remedied by the Minnesota Beer Brewers and Wholesalers Act, it is unnecessary to address the third part of the *Energy Reserves* test.

Accordingly, our answer to the certified question is that the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat.

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[15] The bill introduced in the senate was originally an amendment to Chapter 80C, the Minnesota Franchise Law. It is not exactly clear why it was codified as chapter 325B.

§ 325B.01, *et seq.* applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. § 325B.15 does unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement, U.S. Const. art. I, § 10 and Minn. Const. art. 1, § 11.

Reversed.

YETKA, Justice (dissenting).

The states are given broad police powers in regulating traffic in liquor under U.S. Const. art. XXI, § 2. Moreover, even without the passage of this act, it appears to me that plaintiffs here would have a right to recourse on the grounds that there must be some reasonable basis for denying the transfer of the franchise. The agreement between the parties itself states that Anheuser-Busch agrees to abide by both existing and future amendments to the liquor laws of Minnesota.

[392 N.W.2d 876]

> The laws, rules and regulations of the jurisdiction in which Wholesaler conducts its business, to the extent that they may now or hereafter bear upon the contractual relationships between Wholesaler and Anheuser-Busch, are hereby incorporated in this Agreement and made a part hereof.

Anheuser-Busch Wholesaler Equity Agreement § 16.

Accordingly, in my opinion, the Minnesota act ought to be upheld.

STATE OF MINNESOTA
COUNTY OF ST. LOUIS

DISTRICT COURT
SIXTH JUDICIAL DISTRICT

Earl D. Jacobsen, and Ernest R. Jacobsen, Individually and as Co-Trustees under Voluntary Proceedings for the Voluntary Liquidation and Dissolution of Saratoga Distributing Company; and Ribbon Distributing, Inc.,

Plaintiffs,

vs.

Anheuser-Busch, Incorporated,

Defendant.

ORDER

File No. 145208
Part III

The above-captioned matter came before the undersigned at a Special Term of this Court on April 17, 1985.

APPEARANCES

Appearing on behalf of the Plaintiffs, William D. Sommerness and David R. Oberstar, Attorneys at Law, 700 Lonsdale Building, Duluth, Minnesota 55802.

Attorney for the Defendant, Lawrence C. Brown, Attorney at Law, 2300 Multifoods Tower, 33 South Sixth Street, Minneapolis, Minnesota 55402.

Attorney for the Defendant, Steven W. Schneider, Attorney at Law, 700 Providence Building, Duluth, Minnesota 55802.

Defendant moved the Court for an order declaring that Chapter 325B of the Minnesota Statutes, insofar as it purports to permit a retroactive application thereof, is unconstitutional and violates both the Federal and Minnesota Constitutions. The Plaintiff opposed the motion and contends that the

challenged statutory pronouncement of the Minnesota Legislature is valid and should not be declared unconstitutional.

The Attorney General's Office of the State of Minnesota was duly notifed of the pendency of this action and declined to take part herein, or to submit any brief or memorandum.

The parties were provided an opportunity to submit post-hearing memoranda and citation of authorities and have done so.

In the event that the Court does not hold that the challenged statute is unconstitutional, both parties ask the Court to certify the matter as being important and doubtful.

The Court having reviewed the contents of the file, having considered oral and written arguments of counsel, having reviewed pertinent legal authorities, and deeming itself advised in the premises now makes its:

ORDER

IT IS ORDERED that the motion of the Defendant for a declaration by the Court declaring the Beer Brewers and Wholesalers Act, contained within Chapter 325B of the Minnesota Statutes unconstitutional be and the same herewith is denied.

BY THE COURT,
/s/CHARLES T. BARNES
Judge Thereof

DATED 8-19-85

MEMORANDUM

The Defendant strenuously argues that the Minnesota Beer Brewers and Wholesalers Act is unconstitutional by reason of its retroactive application to existing contracts. The arguments advanced and the cases cited in support of that contention are well reasoned.

However, in view of the well-recognized requirement that the constitutionality of statutes must be upheld if at all possible, and in view of the stringency required by the courts

in establishing unconstitutionality, this Court has reluctantly denied the motion of the Defendant.

The recent case of Minnesota Trust Company of Austin, Minnesota vs. Michael Hatch, et al, decided by the Court of Appeals on May 31, 1985, is the most recent pronouncement in our State on the contract clause of the Minnesota and United States Constitutions. The trial court there had declined to declare certain statutes unconstitutional and the Court of Appeals affirmed that decision. In that case, as here, the party challenging the constitutionality made a strong showing that its contractual rights had been impaired by passage of relatively new statutory regulations.

In that case, and in this case, it is clear that the legislature has a strong concern about regulation of certain businesses. Few, if any, industries and businesses are more closely regulated in Minnesota than the beer and liquor industries. This scheme of regulation clearly establishes the on-going concern of our legislature as it relates to liquor and beer business activities.

The retroactive nature of the challenged statute clearly affects the contractual status of the parties. As in the Minnesota Trust case, the undersigned reluctantly concludes that the impairment of contract does not rise to constitutional dimension.

As noted in the preamble to the Order, the parties desire that this decision be certified to the Court of Appeals, and/or the Minnesota Supreme Court as being important and doubtful.

The Court is willing to do that and invites the parties to agree upon an appropriate form of certification. Upon presentation to the undersigned of an agreed form of the certified question or questions, certification action will be taken by the Court.

CTB

STATE OF MINNESOTA
COUNTY OF ST. LOUIS

DISTRICT COURT
SIXTH JUDICIAL DISTRICT

EARL D. JACOBSEN, and ERNEST R. JACOBSEN, Individually and as Co-Trustees under Voluntary Proceedings for the Voluntary Liquidation and Dissolution of Saratoga Distributing Company; and Ribbon Distributing, Inc.,

Plaintiffs,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Defendant.

File No. 145208
ORDER

The Court has previously considered the motion of defendant Anheuser-Busch, Incorporated to dismiss Counts I and II of plaintiffs' Complaint, and denied that motion by Order and Memorandum dated August 19, 1985 (copy attached).

Counts III and IV of plaintiffs' Complaint were earlier dismissed by the Court or voluntarily abandoned by the plaintiffs prior to trial, thereby leaving only the claims pleaded in Counts I and II for trial. Plaintiffs' Count I claims are predicated solely upon defendant's alleged violations of the Minnesota Beer Brewers And Wholesalers Act, Minn. Stat. §§ 325B.01, *et. seq.*, effective May 28, 1977. Defendant asserts the constitutional challenge in defense to plaintiffs' Count I claims that the statutes in question, if applied retroactively as expressly mandated by Minn. Stat. § 325B.15, would violate Art. I, § 10 of the Constitution of the United States and Art. I, § 11 of the Constitution of the State of Minnesota (impairment of contract). Plaintiffs' Count II claim is for puni-

tive damages based on Minn. Stat. § 325B.08, or in the alternative, Minn. Stat. § 549.20.

The Court has concluded, and the parties concur, that to proceed to a full trial on the merits of plaintiffs' Count I and Count II claims would be wasteful of the Court's time and the parties would be put to undue expense if defendant's constitutional challenge and defense to plaintiffs' Count I claims are meritorious. Therefore, pursuant to Rule 103.03(h), Rules of Appellate Procedure, the Court hereby certifies that the following question, presented by defendant's said motion to dismiss is important and doubtful:

> Does the Minnesota Beer Brewers And Wholesalers Act, Minn. Stat. §§ 325B.01 *et seq.*, applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. § 325B.15, unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement under Art. I, § 10 of the Constitution of the United States and Art. I, § 11 of the Constitution of the State of Minnesota (impairment of contract).

BY THE COURT,
/s/CHARLES T. BARNES
Judge

DATED 9-17-85

ANHEUSER-BUSCH WHOLESALER EQUITY AGREEMENT

Anheuser-Busch, Incorporated ("Anheuser-Busch") agrees to sell and the undersigned Wholesaler ("Wholesaler") agrees to buy f.o.b. source brewery as designated by Anheuser-Busch from time to time, such brands of malt beverages as are presently being sold by Anheuser-Busch to Wholesaler (such malt beverages being herein referred to as "Products") pursuant to the following terms and conditions:

1. AREA OF PRIMARY RESPONSIBILITY:
Wholesaler agrees to exercise its best efforts to promote, sell and service Anheuser-Busch's Products in the geographic area designated on Exhibit 1 as Wholesaler's primary market area. Wholesaler shall be primarily responsible for servicing retail accounts in its primary market area with Anheuser-Busch Products and will be expected to concentrate its efforts in that area. It is understood, however, that, unless required by state law, Anheuser-Busch does not assign exclusive areas and does not grant exclusivity to Wholesaler in its primary market area.

2. PERSONAL SERVICE AGREEMENT:
Malt beverages are unique products sold at retail establishments for consumption off-premise and on-premise. Wholesaler relies upon Anheuser-Busch for the production of quality Products, for support in consumer advertising of such Products, and for the counsel and advice of Anheuser-Busch's field personnel in support of Wholesaler's efforts to achieve maximum market representation of Anheuser-Busch Products in Wholesaler's primary market area. The sale of malt beverages requires highly personalized promotion and sales service efforts. Anheuser-Busch relies upon the personal efforts and capabilities of the principal manager of Wholesaler's operation to aggressively promote, sell and service Anheuser-Busch's Products. The business of selling malt beverages at wholesale has generally proved to be more suc-

cessful when the principal manager of such business has at least some ownership interest. The parties therefore agree that this is a personal service contract and is entered into by Anheuser-Busch with Wholesaler in reliance upon and in consideration of the personal qualifications of the person identified below (such person being hereinafter referred to as "Manager") who will principally manage the business of Wholesaler:

ERNEST R. JACOBSEN
Manager

Nothing contained in this Agreement shall be interpreted as giving to Manager any right to be retained in Wholesaler's employ or as interfering with or limiting the right of Wholesaler at any time in its sole discretion (without obtaining the approval of Anheuser-Busch) to terminate the employment of Manager or to change Manager's duties so that he is no longer principally managing the business. However, any such action by Wholesaler shall constitute "cessation of employment" of Manager within the meaning of paragraph 3(e) of this Agreement and shall impose on Wholesaler the obligation to follow the procedures set forth in paragraph 3 with respect to the designation of a Successor-Manager.

3. DESIGNATION OF SUCCESSOR-MANAGER:
It is important to both Wholesaler and Anheuser-Busch that at such time as Manager becomes unable to manage Wholesaler's business, he be succeeded by an individual who is qualified to do so. In order to plan for such a contingency and to provide for continuity in the on-going management of Wholesaler's business involving the sale of Anheuser-Busch's Products, the parties agree to be governed by the following procedures:

(a) Wholesaler shall have the right at any time while Manager is managing the business of Wholesaler, to submit to Anheuser-Busch a "Successor-Manager Application" in the form attached to this Agreement as Exhibit 2, for the pur-

pose of obtaining the approval of Anheuser-Busch of the person who, in Wholesaler's judgment, would be capable of managing Wholesaler's business at such time as Manager becomes unable to do so. Within 30 days after the date of receipt of the Successor-Manager Application, Anheuser-Busch shall notify Wholesaler, in writing, whether it does or does not approve the person whom Wholesaler desires to designate as a Successor-Manager. Anheuser-Busch shall not unreasonably withhold its approval. Failure of Anheuser-Busch to notify Wholesaler within said time shall automatically constitute approval of the Successor-Manager. In the event Anheuser-Busch should not approve the person designated in the Successor-Manager Application, Wholesaler shall have the right to submit additional Successor-Manager Applications. After a Successor-Manager has been approved, then at such time as Manager becomes unable to manage the business of Wholesaler, Anheuser-Busch and Wholesaler shall re-execute the Anheuser-Busch Wholesaler Equity Agreement with the name of the new Manager inserted in paragraph 2.

(b) Even though a Successor-Manager Application shall have been approved by Anheuser-Busch, until such time as the Manager becomes unable to manage Wholesaler's business, the parties shall have the following rights:

> **(i)** Wholesaler shall have the right to revoke its designation of the Successor-Manager by giving written notice to Anheuser-Busch of such revocation, and to submit a new Successor-Manager Application to Anheuser-Busch.
>
> **(ii)** Anheuser-Busch shall have the right, for good cause, to withdraw its approval of the Successor-Manager by giving written notice to Wholesaler. Wholesaler shall have the right, at any time after receiving Anheuser-Busch's notice of withdrawal of approval, to submit a new Successor-Manager Application.

Wholesaler may, or may not, in its judgment, disclose to the individual designated as Successor-Manager that he has been

so designated. In any event, however, in view of the rights herein reserved (to Wholesaler to revoke the designation of a Successor-Manager and to Anheuser-Busch to withdraw its approval of a Successor-Manager) both parties agree not to enter into any agreement, written or oral, with a person who has been designated as a Successor-Manager which would give rise to any purported right in such person to become the Manager.

(c) If a Successor-Manager shall not have been designated by Wholesaler and approved by Anheuser-Busch prior to the time that Manager becomes unable to manage Wholesaler's business, then promptly after Anheuser-Busch becomes aware of the fact that Manager is unable to manage Wholesaler's business, Anheuser-Busch shall notify Wholesaler in writing that Wholesaler has 90 days from the date said written notice was received by Wholesaler to obtain the approval of Anheuser-Busch of a Successor-Manager. (In a situation in which unusual and extenuating circumstances are present, said 90-day period may be extended by mutual written agreement of both parties.) Upon receipt of a Successor-Manager Application form from Wholesaler, Anheuser-Busch shall notify Wholesaler, in writing, within 20 days after the receipt of the Successor-Manager Application whether it does or does not approve the Successor-Manager. Anheuser-Busch's approval shall not be unreasonably withheld. Failure on the part of Anheuser-Busch to respond within said 20-day period shall automatically constitute approval of the Successor-Manager. If Anheuser-Busch does not approve the designated Successor-Manager, Wholesaler shall have the right, at any time before the expiration of the above-mentioned 90-day period, to submit further Successor-Manager Applications to Anheuser-Busch, provided that the last such Application shall be received at least 20 days prior to the expiration of said 90-day period. If the appointment of a Successor-Manager shall be accomplished within the alloted 90-day period, Anheuser-Busch and Wholesaler shall re-execute the

Anheuser-Busch Wholesaler Equity Agreement with the name of the new Manager inserted in paragraph 2.

(d) It is the intent of this Agreement to give Wholesaler adequate time to designate a person who will be capable of continuing the management of Wholesaler's business after Manager becomes unable to manage Wholesaler's business, but in the event that a Successor-Manager shall not have been designated and approved according to the procedures set forth in the preceding subparagraphs of this paragraph 3, Wholesaler shall nevertheless be given an additional 90 days (commencing with the expiration of the 90-day period specified in the preceding subparagraph (c)), to sell its business as a going concern according to the procedures and limitations set forth in paragraph 4(b) of this Agreement. (In a situation in which unusual and extenuating circumstances are present, the 90-day period allowed for selling the wholesalership may be extended by mutual written agreement of both parties.) In the event, however, that Wholesaler is either unwilling or unable to effect a sale of its business as a going concern within such additional 90-day period, this Agreement shall automatically terminate and Anheuser-Busch shall pay Wholesaler an amount (which shall be in addition to any amounts payable for inventory and other tangible assets under paragraph 7) determined by multiplying by three the Wholesaler's after-tax net income attributable to the sale of Anheuser-Busch Products for Wholesaler's most recently completed fiscal year preceding the year in which the termination occurs. "After-tax net income" shall mean the proceeds realized from the sale of Anheuser-Busch Products during Wholesaler's most recently completed fiscal year, less all direct and indirect costs and expenses (including depreciation computed on a straight-line basis and including taxes on income but excluding non-recurring or extraordinary charges or credits) incurred in the purchase, storage, sale and delivery of such Products. After-tax net income shall be determined

in accordance with generally accepted accounting principles and practices.

(e) Whenever reference is made in this Agreement to the Manager being "unable to manage Wholesaler's business," it is agreed that such inability may arise from death, retirement, cessation of employment with Wholesaler, or from physical or mental incapacity other than temporary incapacity.

(f) Notwithstanding any other provision contained in this paragraph 3, it is agreed that the choosing of a Manager for Wholesaler's business shall be the responsibility and prerogative of Wholesaler in conducting its independent business and that the rights given to Anheuser-Busch to approve the designation of a Successor-Manager and to withdraw such approval are given solely to enable Anheuser-Busch to pass upon the qualifications and competence of the individual who is chosen by Wholesaler to manage Wholesaler's business and who will therefore be responsible for promoting and selling the Products of Anheuser-Busch. Anheuser-Busch agrees that it will not use these rights in such a way as to usurp the right of Wholesaler to choose its own Manager.

4. OWNERSHIP OF WHOLESALER:
Although this is a personal service agreement and the participation of Manager is vital to both parties, the ownership of Wholesaler is also important because it is the owner or owners who have the right to establish basic policies and have the responsibility of providing financing, manpower, equipment and facilities for the effective operation of the business. Moreover, Anheuser-Busch has always looked to the owner (even though he may not be the Manager) of a wholesalership to maintain an active interest in the business, to be knowledgeable at all times of the operation and to regularly supervise the work of the Manager. Therefore, because the identity of the owner(s) could also have a significant effect on the sale of Anheuser-Busch Products, the parties agree as follows:

(a) Unless Wholesaler shall have obtained the prior written approval of Anheuser-Busch to a proposed change in ownership of Wholesaler under the provisions of the following subparagraph (b), this Agreement shall terminate whenever there is a change in the ownership of Wholesaler which results in a change in the control of Wholesaler's business. (As used in this Agreement the term "control" shall mean that combination of ownership interests which in legal or practical effect, in the reasonable judgment of Anheuser-Busch, has the power to determine the policies under which Wholesaler's business shall be operated.) In such event, Anheuser-Busch shall mail to Wholesaler a written notice of termination and upon such termination Anheuser-Busch's only obligation to Wholesaler hereunder shall be to purchase Wholesaler's inventory as provided in paragraph 7.

(b) Wholesaler shall have the right to request from Anheuser-Busch written approval in advance of any proposed transfer of ownership interest. The procedure shall be as follows: (i) Wholesaler shall mail to Anheuser-Busch a Request for Approval of Proposed Change in Ownership in form attached hereto as Exhibit 3; (ii) if the Request for Approval of Proposed Change in Ownership furnishes Anheuser-Busch with sufficient information to enable it to pass upon the proposed change in ownership, then within 30 days after the Request form has been received, Anheuser-Busch shall notify Wholesaler in writing whether it approves or disapproves the proposed change in ownership; (iii) in the event Anheuser-Busch decides that it needs additional information from Wholesaler in order to determine whether to approve the proposed change in ownership, Anheuser-Busch shall, within 10 days after the Request for Approval of Proposed Change in Ownership has been received from Wholesaler, request, in writing, of Wholesaler such additional information as Anheuser-Busch needs to make such determination, it being understood that Anheuser-Busch may request as part of such additional information a pro forma balance sheet and detailed

pro forma profit and loss statements on behalf of the proposed new owner(s) for a five-year period; (iv) Wholesaler shall submit such additional information as promptly as possible; (v) within 30 days after the date on which all such additional information has been received, Anheuser-Busch shall notify Wholesaler in writing whether it approves or disapproves the proposed change in ownership. Failure on the part of Anheuser-Busch to take action within any of the time frames established in this subparagraph (b) shall automatically constitute approval of the proposed change in ownership.

(c) Wholesaler also agrees to notify Anheuser-Busch promptly of any change in ownership of Wholesaler by mailing to Anheuser-Busch a Notice of Change in Ownership in form attached hereto as Exhibit 4, it being the intent of this provision that Anheuser-Busch be informed at all times concerning the ownership of Wholesaler.

(d) The action of individual owners could have the effect of terminating this Agreement under the provisions of this paragraph 4, and it is solely Wholesaler's responsibility to notify the owners of Wholesaler of the provisions of this paragraph 4.

(e) Under no circumstance shall Wholesaler or any owner of Wholesaler have the right to sell the business of Wholesaler or any ownership interest therein if such sale would result in Wholesaler being owned in whole or in part, directly or indirectly, by the public. For the purpose of this Agreement, ownership "by the public" shall be deemed to include any situation in which any securities of Wholesaler, or of a corporation which, directly or indirectly, has an ownership interest in the Wholesaler, are traded in the open market, or sold over-the-counter or on any stock exchange.

(f) Notwithstanding any other provision contained in this paragraph 4, no approval of Anheuser-Busch shall be required for any transfer of ownership to heir(s) or legatee(s) of an owner of Wholesaler even though such transfer may result

in a change in control, provided, however, that subsequent transfers of such ownership interests by such heir(s) or legatee(s) shall thereafter be subject in all respects to the provisions of this Agreement, including without limitation, the provisions of this paragraph 4.

5. DEFICIENCY-TERMINATION:
For many years Anheuser-Busch and its wholesalers have successfully used certain sales and merchandising methods and observed certain standards which have been carefully developed to preserve the quality image of Anheuser-Busch Products and to produce maximum sales for its wholesalers not only for the present but also for the future. The parties agree that failure to use or observe one or more of these methods or standards could result in the deterioration of Wholesaler's market position even though its current sales may be good. These sales and merchandising methods and operating standards are well known to Anheuser-Busch wholesalers, but to eliminate any uncertainty, they are set forth in detail in Exhibit 5 attached to this Agreement. The mere fact, however, that a wholesaler's current sales record is favorable does not necessarily mean that its operation is without deficiencies; conversely, the mere fact that a wholesaler's current sales record is unfavorable does not necessarily mean that its operation is deficient. If Wholesaler should fail to use or observe one or more of the sales and merchandising methods and standards set forth in Exhibit 5 in a manner and to the extent consistent with the type of market which is Wholesaler's primary market area, Anheuser-Busch shall have the right to terminate this Agreement (which termination is herein referred to as a "deficiency-termination") subject, however, to the termination procedures hereinafter set forth:

(a) If Anheuser-Busch's field sales personnel advise Anheuser-Busch's Manager-Field Sales Operations that Wholesaler has been and continues to be deficient by reason of failure to use or observe one or more of said sales and merchandising methods and standards, Anheuser-Busch's

Manager-Field Sales Operations shall have an analysis of Wholesaler's operation made by Anheuser-Busch personnel who do not normally work in the area where Wholesaler sells Anheuser-Busch Products.

(b) The findings of such analysis shall be studied by Anheuser-Busch's Manager-Field Sales Operations and if it is determined that there are deficiencies, Wholesaler shall be furnished with a written notification of such determination, together with a summary of the findings. Wholesaler shall also be given an opportunity to meet with Anheuser-Busch's Manager-Field Sales Operations at Anheuser-Busch's principal office in the City of St. Louis, Missouri, within a period of not less than 10 days and not more than 30 days after such written notification and summary have been received by Wholesaler.

(c) If Wholesaler elects to have such a meeting, the meeting shall be chaired by the Vice President-Marketing, Brewery Division, of Anheuser-Busch. The meeting shall be conducted in a fair and reasonable manner and afford both Wholesaler and Anheuser-Busch the opportunity to discuss the deficiencies asserted by Anheuser-Busch and to determine what corrective steps should be taken to remedy the situation.

(d) At the conclusion of such a meeting, if it is determined by Anheuser-Busch's Vice President-Marketing, Brewery Division that there are deficiencies in Wholesaler's operation, and if Wholesaler expresses a willingness to try to correct such deficiencies, Anheuser-Busch shall establish a reasonable time period of not less than 60 days and no more than 120 days from the date of such meeting to permit Wholesaler to correct such deficiencies.

(e) Upon the expiration of the time period allotted for the correction of deficiencies, Wholesaler's operation shall again be analyzed to determine if the deficiencies have been corrected.

(f) In the event Wholesaler has not corrected the deficiencies within the time allotted (or in the event Wholesaler shall not have availed itself of the opportunity to have the meeting provided for in subparagraph (b)), Anheuser-Busch, upon written notice to Wholesaler signed by Anheuser-Busch's Vice President-Marketing, Brewery Division, shall have the right to immediately terminate this Agreement with Wholesaler pursuant to the provisions of subparagraph (g).

(g) Unless Wholesaler has, prior to the receipt of notice of a deficiency-termination, sold his business as a going concern pursuant to the provisions of paragraph 4(b), Anheuser-Busch agrees to pay Wholesaler upon such a deficiency-termination an amount determined by multiplying by three the Wholesaler's after-tax net income attributable to the sale of Anheuser-Busch Products for Wholesaler's most recently completed fiscal year preceding the year in which the termination occurs. The term "after-tax net income" shall have the same meaning and shall be determined as set forth in paragraph 3(d).

6. IMMEDIATE-TERMINATION:
Under certain extreme and serious situations it is essential that Anheuser-Busch shall have the right to terminate the brewer-wholesaler relationship immediately, and therefore, notwithstanding any other provision in this Agreement, if any of the hereinafter enumerated events should occur, Anheuser-Busch shall have the right, upon giving written notice to Wholesaler, to immediately terminate this Agreement (said termination being herein referred to as "immediate-termination") without following any of the deficiency-termination procedures and without paying any amount to Wholesaler upon such immediate-termination (except only for the purchase of Wholesaler's inventory of Anheuser-Busch Products as provided in paragraph 7):

(a) The assignment or attempted assignment by Wholesaler for the benefit of creditors the institution of proceedings in

bankruptcy by or against Wholesaler, the dissolution or liquidation of Wholesaler, the insolvency of Wholesaler or Wholesaler's failure to pay for Anheuser-Busch Products in accordance with approved credit terms.

(b) Conviction of Wholesaler or of any owner of Wholesaler of a felony which, in the reasonable judgment of Anheuser-Busch, may adversely affect the goodwill or interests of Wholesaler or Anheuser-Busch.

(c) Fraudulent conduct of Wholesaler in any of its dealings with Anheuser-Busch or its Products.

(d) Revocation or suspension for more than 90 days of Wholesaler's federal basic permit or of any state of local license required of Wholesaler for the normal operation of his business.

7. DISPOSITION OF CERTAIN TANGIBLE ASSETS OF WHOLESALER IN THE EVENT OF A TERMINATION: In the event of any termination of the brewer-wholesaler relationship, whether by Wholesaler or by Anheuser-Busch, regardless of the reason for such termination, Anheuser-Busch shall purchase and Wholesaler shall sell to Anheuser-Busch its inventory of Anheuser-Busch Products at laid-in-cost, and Wholesaler shall return to Anheuser Busch, at Anheuser-Busch's expense, all of Anheuser-Busch's cooperage in Wholesaler's possession. (For the purpose of this Agreement, "laid-in-cost" shall mean the aggregate of (i) the amount paid by Wholesaler to Anheuser-Busch for the Products, (ii) the cost of transporting the Products to Wholesaler's warehouse, (iii) the amount of any state and local taxes paid by Wholesaler in connection with the purchase of the Products from Anheuser-Busch, and (iv) a handling charge equal to 10 cents per carton of packaged beer and 25 cents per unit of draft beer.) Moreover, upon the termination of Wholesaler by Anheuser-Busch other than immediate-termination, if Wholesaler should desire to sell any or all of the tangible assets owned and used by Wholesaler in its operation as a wholesaler of

Anheuser-Busch Products, Anheuser-Busch will purchase said tangible assets at their fair market value.

8. OVER-AGE PRODUCT:
Anheuser-Busch and Wholesaler are vitally interested in the maintenance of the superior quality of the Products sold by Wholesaler. In no event, therefore, shall over-age Product (according to age standards published from time to time by Anheuser-Busch) reach the consuming public. If any over-age Product is found in the possession of Wholesaler or in the possession of a retailer to whom Wholesaler sold such Product, Wholesaler agrees, unless prohibited by law, to destroy such over-age Product in accordance with all applicable laws and regulations, and to replace any such Product which had been in the possession of a retailer with fresh Product at no cost to the retailer. Wholesaler's cost of destroying and replacing over-age Product shall be borne by Wholesaler or by Anheuser-Busch, depending upon which party was responsible for the over-age condition. The determination of the party responsible for the over-age condition shall be made by the Region Manager of Anheuser-Busch in whose region Wholesaler's principal office is located.

9. RIGHTS RESERVED TO ANHEUSER-BUSCH:
Except to the extent that the specific provisions of this Agreement expressly provide otherwise, Anheuser-Busch reserves to itself the unqualified right to manage its business in all respects, including, but not limited to, the right to maintain or alter the formula, ingredients, labelling or packaging of its Products. Moreover, in the event that Anheuser-Busch is restricted in the sale of its Products by capacity limitations, governmental restrictions, strikes or any other cause beyond its control, Anheuser-Busch shall not be compelled, during the period of time that such restriction(s) affect the production of its Products, to honor all orders for its Products placed by Wholesaler, but shall only be required to distribute its available Products among its wholesalers on a fair and equitable basis.

10. DISCONTINUANCE OF A PRODUCT:
Anheuser-Busch shall have the right, at any time, to discontinue the sale of any of its Products on a national, regional, statewide or media-coverage-area basis.

11. NEW PRODUCTS OF ANHEUSER-BUSCH:
This Agreement shall extend only to the Products presently being marketed by Wholesaler and Wholesaler shall have neither the right nor the obligation to market or distribute any other malt beverage product which Anheuser-Busch may, at any time, decide to sell. At such time in the future as Anheuser-Busch may decide to sell and Wholesaler may decide to buy any other malt beverage(s) produced by Anheuser-Busch, such other malt beverage(s) will, by reason of such sale and purchase, automatically be deemed to be a "Product" or "Products" covered by the terms of this Agreement.

12. FINANCIAL PLANNING:
Wholesaler and Anheuser-Busch recognize that it is to their mutual advantage for Wholesaler to establish budget procedures and to do short and long range business and financial planning. Therefore, unless prohibited by law, Anheuser-Busch agrees to render assistance to Wholesaler in such matters and Wholesaler agrees to make its operating and financial data available to and discuss pro forma operating statements with such representative of Anheuser-Busch as may be designated from time to time by a responsible official of Anheuser-Busch. Any data so obtained by Anheuser-Busch shall be kept in confidence by Anheuser-Busch and its employees and shall not be disclosed to any other party without the prior written consent of Wholesaler.

13. AMENDMENT OF AGREEMENT:
This Agreement is identical with the Agreement which Anheuser-Busch has offered to each of its other wholesalers and Anheuser-Busch agrees that it will not have a different agreement with any other wholesaler, except as provided in

paragraph 16. However, experience indicates that changing circumstances dictate the advisability of changes being made in this type of agreement from time to time to make it a more meaningful and useful document for both parties, particularly since the Agreement has no specific termination date. The Agreement may therefore be amended at any time pursuant to the following procedure:

(a) Anheuser-Busch agrees that concurrently with the submission of a proposed amendment to Wholesaler, it will submit an identical amendment to all other Anheuser-Busch wholesalers.

(b) The amendment shall become effective immediately upon its execution by Wholesaler. If an executed amendment shall not have been received by Anheuser-Busch from Wholesaler within 90 days after the amendment was received by Wholesaler, the Anheuser-Busch Wholesaler Equity Agreement shall automatically terminate and both parties shall be relieved of any further liability or obligation under this Agreement. Upon the termination of this Agreement the relationship between Wholesaler and Anheuser-Busch shall thereafter be that of purchaser and seller, on an individual purchase order basis, f.o.b. source brewery (as designated by Anheuser-Busch from time to time), terminable at will by either party at any time.

14. WHOLESALER'S RIGHT TO TERMINATE:
Wholesaler shall have the right to terminate this Agreement and its relationship with Anheuser-Busch at any time upon giving Anheuser-Busch 90 days written notice. In such event, Wholesaler shall be entitled to no termination payment from Anheuser-Busch, and Anheuser-Busch's only obligation hereunder shall be to purchase Wholesaler's inventory of Anheuser-Busch Products pursuant to the provision of paragraph 7. Anheuser-Busch shall not be obligated to purchase the other tangible assets described in paragraph 7.

15. ANHEUSER-BUSCH'S RIGHT TO TERMINATE AGREEMENT:

Anheuser-Busch shall have the right to terminate this Agreement at any time by giving Wholesaler at least 90 days written notice and provided that Anheuser-Busch shall give a similar notice to all other wholesalers who have entered into a Wholesaler Equity Agreement with Anheuser-Busch. Upon such termination, the relationship between Anheuser-Busch and Wholesaler shall thereafter be that of purchaser and seller on an individual purchase order basis, f.o.b. source brewery (as designated by Anheuser-Busch from time to time), terminable at will by either party at any time. The exercise of the rights herein reserved shall be without liability of Anheuser-Busch to Wholesaler under any provision of this Agreement.

16. COMPLIANCE WITH LAW:

The provisions of this Agreement are subject to and shall be governed by the laws of the jurisdiction in which Wholesaler's principal place of business is located. The illegality or unenforceability of any provision of this Agreement shall not operate to impair the legality or enforceability of any other provision of this Agreement. The laws, rules and regulations of the jurisdiction in which Wholesaler conducts its business, to the extent that they may now or hereafter bear upon the contractual relationships between Wholesaler and Anheuser-Busch, are hereby incorporated in this Agreement and made a part hereof. If required by the laws of a state, Anheuser-Busch and all Anheuser-Busch wholesalers in such state may enter into an amendment of this Agreement for the sole purpose of complying with such laws, and such amendment shall not constitute a breach of the provisions of paragraph 13.

17. ASSIGNMENT OF AGREEMENT:

Wholesaler shall have the right to assign this Agreement as part of a sale of the assets of its business as a going concern, provided, however, that inasmuch as such sale would have the same effect as a change in the control of the business

resulting from a change in ownership, such assignment shall not be effective without the prior written consent of Anheuser-Busch by following the procedures set forth in paragraph 4(b). Except as provided in this paragraph 17, this Agreement shall not be assignable by Wholesaler whether by operation of law or otherwise.

18. MISCELLANEOUS PROVISIONS:

(a) Change in Title: In certain provisions of this Agreement the present title of an Anheuser-Busch employee is used to designate the person who has the responsibility of carrying out a provision of this Agreement or to make a determination on behalf of Anheuser-Busch. The title of such person may from time to time be changed by Anheuser-Busch, and in such event the parties agree that it shall not be necessary to amend this Agreement to reflect such new title and that this Agreement shall automatically be construed as incorporating the new title wherever appropriate.

(b) References to Wholesaler: The great majority of Anheuser-Busch wholesalers are incorporated, and the wording of this Agreement reflects this fact. Where Wholesaler is a partnership or sole proprietorship the pronouns used in this Agreement and any other references to Wholesaler shall be construed in such manner as to make them applicable in all respects to a partnership or sole proprietorship, as the case may be.

(c) Notices: All notices, requests, consents, applications and other written communications between the parties pursuant to the provisions of this Agreement shall be transmitted by United States first-class registered mail or certified mail with return receipt requested, with postage prepaid and addressed (i) if to Wholesaler, to Wholesaler's last known place of business as indicated in the records of Anheuser-Busch, and (ii) if to Anheuser-Busch, to the Office of the Secretary, Anheuser-Busch, Inc. 721 Pestalozzi Street, St. Louis, Missouri 63118.

(d) Document Constitutes Entire Agreement: This document, including Exhibits 1, 2, 3, 4 and 5, constitutes the entire Agreement between the parties, and there are no other agreements or understandings, either written or oral, between the parties affecting or modifying this Agreement in any way.

ANHEUSER-BUSCH, INCORPORATED

By /s/ Date Sept. 7, 1976
Vice President—Marketing, Brewery Division

Wholesaler: Saratoga Distributing Co.

By /s/Earl Jacobsen Date Aug. 26, 1976
Pres.

Indicate whether Wholesaler is a sole proprietorship, partnership or corporation.

☐ Sole Proprietorship
☐ Partnership
☒ Corporation

EXHIBIT 5

SALES AND MERCHANDISING STANDARDS

1. Utilization of the principles of a sales program which recognizes varying sales potentials of certain accounts (such as Key Potential Accounts) and establishes a regular frequency of call (such as Total Call Frequency); planned route selling; and the maintenance of records, either manually or mechanically posted, to reflect sales made to individual retail establishments served by Wholesaler.

2. Maintenance of a clean warehouse of a size capable of meeting Anheuser-Busch standards with regard to inventory levels sufficient to prevent over-stock or out-of-stock conditions in retail establishments served by the Wholesaler and under conditions which insure the protection of the quality of Anheuser-Busch Products.

3. Proper stock rotation in the warehouse, on trucks, and, where legal, in retail accounts in conformity with published Anheuser-Busch standards with regard to each of its Products.

4. Maintenance of sufficient over-the-road and local delivery equipment of adequate type, in clean appearance and good state of repair and the utilization of Anheuser-Busch published standards for Product identification on such equipment as mutually agreed upon.

5. Proper handling, storage, placement and installation of point-of-sale materials, and the maintenance and replacement of such materials.

6. Personal involvement of Wholesaler's Manager in maintaining satisfactory and continuous liaison with the retail trade.

7. Utilization of maximum efforts to further the sales of Anheuser-Busch Products by maintaining adequate capital to strengthen and develop facilities, equipment and personnel and by maintaining maximum and competitive distribution in all sections of the market. Included in personnel development shall be attendance by Wholesaler's personnel at such Anheuser-Busch sales, service and related meetings and training schools as may from time to time be suggested or scheduled by Anheuser-Busch.

8. Maintenance and prompt submission to Anheuser-Busch of Sales and Inventory reports and such other records and reports and financial data as from time to time may reasonably be requested by Anheuser-Busch.

Chapter 325B
BEER BREWERS AND WHOLESALERS

325B.01 Definitions

Subdivision 1. As used in sections 325B.01 to 325B.17 and unless otherwise required by the context, the terms defined in this section have the meanings given them.

Subd. 2. "Agreement" means one or more of the following:

(a) A commercial relationship between a licensed beer wholesaler and a licensed brewer of a definite or indefinite duration, which is not required to be evidenced in writing;

(b) A relationship whereby the beer wholesaler is granted the right to offer and sell a brand or brands of beer offered by a brewer;

(c) A relationship whereby the beer wholesaler, as an independent business, constitutes a component of a brewer's distribution system;

(d) A relationship whereby the beer wholesaler's business is substantially associated with a brewer's brand or brands, designating the brewer;

(e) A relationship whereby the beer wholesaler's business is substantially reliant on a brewer for the continued supply of beer;

(f) A written or oral arrangement for a definite or indefinite period whereby a brewer grants to a beer wholesaler a license to use a brand, trade name, trademark, or service mark, and in which there is a community of interest in the marketing of goods or services at wholesale or retail.

Subd. 3. "Beer wholesaler" shall mean any licensed person importing or causing to be imported into this state or purchasing or causing to be purchased within this state, any beer for sale or resale to retailers or wholesalers licensed under Minnesota Statutes, Chapter 340, without regard to whether the business of the person is conducted under the terms of an agreement with a licensed brewer.

Subd. 4. "Brewer" means every licensed brewer of beer located within or without the state of Minnesota, who enters into an "agreement" with any beer wholesaler licensed to do business in the state of Minnesota.

Subd. 5. "Person" means a natural person, corporation, partnership, trust, agency, or other entity as well as the individual officers, directors or other persons in active control of the activities of each such entity. Person also includes heirs, assigns, personal representatives and guardians.

Subd. 6. "Territory" or "sales territory" means the area of primary sales responsibility designated by any agreement between any beer wholesaler and brewer for the brand or brands of any brewer.

325B.02 No inducement or coercion

No brewer shall:

(1) Induce or coerce, or attempt to induce or coerce, any beer wholesaler to accept delivery of any alcoholic beverage or any other commodity which shall not have been ordered by the beer wholesaler.

(2) Induce or coerce, or attempt to induce or coerce, any beer wholesaler to do any illegal act or thing by threatening to amend, cancel, terminate, or refuse to renew any agreement existing between a brewer and a beer wholesaler.

(3) Require a wholesaler to assent to any condition, stipulation or provision limiting the wholesaler in his right to sell the product of any other brewer anywhere in the state of Minnesota, provided that the acquisition of the product of another brewer does not materially impair the quality of service or quantity of sales of the existing brand or brands of the brewer seeking to impose the condition, stipulation or provision.

325B.03 No dual distribution

No brewer who designates a sales territory for which any wholesaler shall be primarily responsible shall enter into any agreement with any other beer wholesaler for the purpose

of establishing an additional agreement for its brand or brands of beer in the same territory served by a beer wholesaler with that particular brand.

325B.04 Cancellation

Notwithstanding the terms, provisions or conditions of any agreement, no brewer shall amend, cancel, terminate or refuse to continue to renew any agreement, or cause a wholesaler to resign from an agreement, unless good cause exists for amendment, termination, cancellation, nonrenewal, noncontinuation or causing a resignation. "Good cause" shall not include the sale or purchase of a brewer. "Good cause" shall include, but not be limited to, the following:

(1) Revocation of the wholesaler's license to do business in the state.

(2) Bankruptcy or insolvency of the wholesaler.

(3) Assignment for the benefit of creditors or similar disposition of the assets of the wholesaler.

(4) Failure by the wholesaler to substantially comply, without reasonable excuse or justification, with any reasonable and material requirement imposed upon him by the brewer.

325B.05 Notice of intent to terminate

Except as provided in this section, a brewer shall provide a wholesaler at least 90 days prior written notice of any intent to amend, terminate, cancel or not renew any agreement. The notice shall state all the reasons for the intended amendment, termination, cancellation or nonrenewal. The wholesaler shall have 90 days in which to rectify any claimed deficiency. If the deficiency shall be rectified within 90 days of notice, then the proposed amendment, termination, cancellation or nonrenewal shall be null and void and without legal effect. The notice provisions of this section shall not apply if the reason for the amendment, termination, cancellation, or nonrenewal is:

(1) The bankruptcy or insolvency of the wholesaler.

(2) An assignment for the benefit of creditors or similar disposition of the assets of the business.

(3) Revocation of the wholesaler's license.

(4) Conviction or a plea of guilty or no contest to a charge of violating a law relating to the business that materially affects the wholesaler's ability to remain in business.

325B.06 Assignment, transfer or sale of business

No brewer shall unreasonably withhold consent to any assignment, transfer or sale of the wholesaler's business whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers.

325B.07 Reasonable compensation

Subdivision 1. Any brewer which amends, cancels, terminates, or refuses to continue or renew any beer agreement, or causes a wholesaler to resign, unless for good cause shown as defined in section 325B.04, from an agreement or unreasonably withholds consent to any assignment, transfer or sale of a wholesaler's business, shall pay the wholesaler reasonable compensation for the value of the wholesaler's business with relationship to the terminated brand or brands. The value of the wholesaler's business shall include, but not be limited to, its good will, if any.

Subd. 2. In the event that the brewer and the beer wholesaler are unable to mutually agree on the reasonable compensation to be paid for the value of the wholesaler's business, as defined herein, the matter shall be submitted to a neutral arbitrator to be selected by the parties, or if they cannot agree, by the Chief Judge of the District Court. All of the costs of the arbitration shall be paid one-half by the wholesaler and one-half by the brewer. The award of the neutral arbitrator shall be final and binding on the parties.

325B.08 Judicial remedies

If a brewer engages in conduct prohibited under sections 325B.01 to 325B.17, a wholesaler may maintain a suit against the brewer. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under sections 325B.01 to 325B.17, including, but not limited to, declaratory judgment and injunctive relief. The court may, if it finds that the brewer has acted in bad faith in invoking the amendment, termination, cancellation or nonrenewal provisions of sections 325B.01 to 325B.17, or has unreasonably withheld its consent to any assignment, transfer or sale of the wholesaler's agreement, award punitive damages, as well as actual damages, costs and attorneys fees.

325B.09 Price of product

No brewer, whether by means of a term or condition of an agreement or otherwise, shall fix or maintain the price at which the wholesaler shall sell any alcoholic beverage.

325B.10 Retaliatory action prohibited

A brewer shall not take retaliatory action against a wholesaler who files or manifests an intention to file a complaint of alleged violation of state or federal law or regulation by the brewer with the appropriate state or federal regulatory authority. Retaliatory action shall include, but shall not be limited to, refusal without good cause to continue the agreement, or a material reduction in the quality of service or quantity of products available to the wholesaler under the agreement.

325B.11 Management

No brewer shall require or prohibit any change in management or personnel of any wholesaler unless the current or potential management or personnel fails to meet reasonable qualifications and standards required by the brewer.

325B.12 No discrimination

No brewer shall discriminate among its wholesalers in any business dealings including, but not limited to, the price of beer sold to the wholesaler, unless the classification among its wholesalers is based upon reasonable grounds.

325B.13 No waiver

No brewer shall require any wholesaler to waive compliance with any provision of sections 325B.01 to 325B.17. Nothing in sections 325B.01 to 325B.17 shall be construed to limit or prohibit good faith settlements of disputes voluntarily entered into between the parties.

325B.14 Obligations of purchaser

Except for good cause, which shall include, but not be limited to (1) revocation of the wholesaler's license to do business in the state, (2) bankruptcy or insolvency of the wholesaler, (3) assignment for the benefit of creditors or similar disposition of the assets of the wholesaler, (4) failure by the wholesaler to substantially comply, without reasonable excuse or justification, with any reasonable and material requirement imposed upon him by the brewery, the purchaser of a "brewer" as defined in sections 325B.01 to 325B.17 shall become obligated to all of the terms and conditions of the agreement in effect on the date of purchase. "Purchase", as defined for the purposes of sections 325B.01 to 325B.17, shall include, but is not limited to, the sale of stock, sale of assets, merger, lease, transfer or consolidation.

325B.15 Coverage

The provisions of sections 325B.01 to 325B.17 shall cover agreements in existence on May 28, 1977, as well as agreements entered into after May 28, 1977.

325B.16 Right of free association

No brewer or wholesaler shall restrict or inhibit, directly or indirectly, the right of free association among brewers or wholesalers for any lawful purpose.

325B.17 Relation to prior law

Sections 325B.01 to 325B.17 supplement and do not supersede any prior law. If they are found to be inconsistent with prior law, the prior law shall govern.

MINN. STAT. § 80C.14 (1973)

80C.14 UNFAIR PRACTICES. No person, whether by means of a term or condition of a franchise or otherwise, shall engage in any unfair or inequitable practice in contravention of such rules as the commissioner may adopt defining as to franchises the words "unfair and inequitable". Any violation of this section is enjoinable by a court of competent jurisdiction.

MINNESOTA REGULATIONS OF SECURITIES DIVISION OF DEPARTMENT OF COMMERCE RELATING TO FRANCHISES:

SDiv 1714 (M.S. 80C.14). Unfair practices. All franchise contracts or agreements and any other device or practice of a franchisor shall conform to the following provisions. It shall be "unfair and inequitable" for any person to:

(a) Restrict or inhibit, directly or indirectly, the free association among franchisees for any lawful purpose; or

(b) Discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any business dealing, unless any classification of or discrimination between franchisees is based on franchises granted at different times, geographic, market, volume or size differences, costs incurred by the fran-

chisor, or other reasonable grounds considering the purposes of Minn. Stat., 1973 Supplement, Sections 80C.01 to 80C.22; or

(c) Compete with the franchisee in an exclusive territory or grant competitive franchises in the exclusive territory previously granted to another franchisee if the terms of the franchise agreement provide that an exclusive territory has been specifically granted to a franchisee; or

(d) Require a franchisee to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by Minn. Stat., 1973 Supplement, Section 80C.01 to 80C.22; provided, that this rule shall not bar the voluntary settlement of disputes; or

(e) Terminate or cancel a franchise without first having given written notice setting forth all the reasons for such termination or cancellation to the franchisee at least 60 days in advance of such termination or cancellation, except that the notice shall be effective immediately upon receipt where the alleged grounds are:

(1) Voluntary abandonment of the franchise relationship by the franchisee; or

(2) The conviction of the franchisee in a court of competent jurisdiction of an offense directly related to the business conducted pursuant to the franchise; or

(3) Failure to cure a default under the franchise agreement which materially impairs the good will associated with the franchisor's tradename, trademark, service mark, logotype or other commercial symbol after the franchisee has received written notice to cure of at least 24 hours in advance thereof; or

(f) Terminate or cancel a franchise except for good cause which shall be defined as failure by the franchisee substantially to comply with those reasonable requirements imposed upon him by the franchise including, but not limited to, (1) the bankruptcy or insolvency of the franchisee; (2) assignment for the benefit of creditors or similar disposition of the assets of the franchise business; (3) voluntary abandonment of the franchise business; (4) conviction or a plea of guilty

or no contest to a charge of violating any law relating to a franchise business; or (5) any act by or conduct of the franchisee which materially impairs the good will associated with the franchisor's trademark, tradename, service mark, logotype or other commercial symbol; or

(g) Impose on a franchisee by contract, rule or regulation, whether written or oral, any standard of conduct which is unreasonable; or

(h) Unreasonably withhold consent to any assignment, transfer, or sale of the franchise whenever the franchisee to be substituted meets the present qualifications and standards required of the franchisees of the particular franchisor; or

(i) Enforce any unreasonable covenant not to compete after the franchise relationship ceases to exist; or

(j) Require a franchisee to waive his rights to a trial or to consent to liquidated damages, termination penalties, or judgment notes; provided, that this rule shall not bar a voluntary arbitration of any matter if the proceeding is conducted by an independent tribunal under the rules of the American Arbitration Association; or

(k) Require a security deposit except for the purpose of securing against damage to property, equipment, inventory or leaseholds; or

(l) Require or prohibit any change in management or personnel of any franchisee unless the current or potential management or personnel fails to meet the present qualifications and standards required by the particular franchisor; or

(m) Fail to renew a franchise unless the franchisee has been given written notice of the intention not to renew at least 90 days in advance thereof and has been given a sufficient opportunity to recover his investment or unless for good cause as defined in clause (f).

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-855

IN THE

Supreme Court of the United States

October Term, 1986

EARL D. JACOBSEN and ERNEST JACOBSEN, Individually and as Co-Trustees under Voluntary Liquidation and Dissolution of Saratoga Distributing Company, and Ribbon Distributing, Inc.,

Petitioners,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Because the decision below[1] answered a certified question, the specific question before the Minnesota Supreme Court, and thus presented to this Court for review, is:

> Does the Minnesota Beer Brewers and Wholesalers Act, Minn. Stat. §§ 325B.01, *et seq.*, applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. § 325B.15, unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement under art. I, § 10 of the Constitution of the United States and art 1, § 11 of the Constitution of the State of Minnesota?

The Petitioners expressly consented to the specific terms of the certified question.[2]

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[1] *Jacobsen v. Anheuser-Busch, Incorporated*, 392 N.W.2d 868 (Minn. 1986) ("decision below").

[2] Order and Consent as to Form, dated September 17, 1985. (Respondent's Supplemental Appendix ("Resp. Supp. App."), page Supp. A-1).

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Rule 28.1 Statement: Respondent Anheuser-Busch, Inc. is a wholly-owned subsidiary of Anheuser-Busch Companies, a Delaware corporation. Anheuser-Busch Companies, through a wholly-owned subsidiary, owns a majority of stock in Exploration Cruise Lines, Inc., a Delaware corporation. Anheuser-Busch Companies is a partner in International Label Company, a New York partnership.

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-855

EARL D. JACOBSEN and ERNEST JACOBSEN,
Individually and as Co-Trustees under Voluntary Liquidation and Dissolution of Saratoga Distributing Company, and Ribbon Distributing, Inc.,

Petitioners,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 10:

> No state shall . . . pass any . . . law impairing the obligation of contracts . . .

Minnesota Constitution, Article 1, Section 11:

> No . . . law impairing the obligation of contracts shall be passed. . . .

United States Constitution, Amendment XXI, Section 2:

> Transportation or importation into any State, Territory or possession of the United States for delivery or use

therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Beer Brewers and Wholesalers Act, Minnesota Statutes Chapter 325B (1977) (selected provisions):

Minnesota Statutes, section 325B.15:

The provisions of sections 325B.01 to 325B.17 shall cover agreements in existence on May 28, 1977, as well as agreements entered into after May 28, 1977.

Minnesota Statutes, section 325B.08:

If a brewer engages in conduct prohibited under sections 325B.01 to 325B.17, a wholesaler may maintain a suit against the brewer. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under sections 325B.01 to 325B.17, including, but not limited to, declaratory judgment and injunctive relief. The court may, if it finds that the brewer has acted in bad faith in invoking the amendment, termination, cancellation or nonrenewal provisions of sections 325B.01 to 325B.17, or has unreasonably withheld its consent to any assignment, transfer or sale of the wholesaler's agreement, award punitive damages, as well as actual damages, costs and attorneys' fees.

Minnesota Statutes, section 325B.06:

No Brewer shall unreasonably withhold consent to any assignment, transfer or sale of the wholesaler's business whenever the wholesaler to be substituted meets the material and reasonable qualifications and standards required of its wholesalers.

THE DECISION BELOW

The Minnesota Supreme Court was confronted in the decision below with Contract Clause challenges by a beer brewer ("Anheuser-Busch"), under the United States and Minnesota constitutions,[3] to a portion of the Minnesota Beer Brewers and Wholesalers Act (Minn. Stat. Ch. 325B, effective May 28, 1977) ("the Act"). Specifically, the challenged portion of the Act is limited to the express *retroactive* mandate of § 325B.15, which made the judicial remedies provided in § 325B.08 available to a Minnesota beer wholesaler ("Saratoga"), who claimed that Anheuser-Busch violated § 325B.06 by unreasonably withholding its consent to a transfer of Saratoga's business to a prospective successor wholesaler ("Ribbon"), where the preexisting Wholesaler Equity Agreement between Saratoga and Anheuser-Busch (Pet. App. at A-20 - A-39) gave Anheuser-Busch the unqualified contractual right to approve or disapprove Saratoga's proposed ownership transfer.

The Minnesota Supreme Court followed the Contract Clause test enunciated in *Energy Reserves,*[4] which it initially adopted and followed in its earlier decision in *Christensen v. Minneapolis Municipal Employees Retirement Board,* 331 N.W.2d 740 (Minn. 1983):

> 1. ". . . a court initially considers whether the state law has, in fact, operated as a substantial impairment of a contractual obligation. The severity of the impairment increases the level of scrutiny to which the legislation is subjected." (392 N.W.2d at 872).

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[3] Art. I, § 10 and art. 1, § 11, respectively.

[4] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983).

2. "Secondly, if a substantial impairment exists, those urging constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation." (*Id.*).

3. "Having ruled that there was no 'significant and legitimate public purpose' to be remedied by the Minnesota Beer Brewers and Wholesalers Act, it is unnecessary to address the third part of the *Energy Reserves* test." (*Id.*, at 875).

Petitioners do not challenge the decision below on the ground that an improper Contract Clause analytical framework was applied by the Minnesota Supreme Court. Petitioners' contention essentially is that the decision below is destructive of the powers of the State of Minnesota under the Twenty-First Amendment (Pet. at 18),[5] despite the fact that "the issue . . . is not whether the legislature could regulate prospectively contracts of this nature, but rather whether the statute can be retroactively applied absent a 'significant and legitimate public purpose.' " (*Id.*, at 876).

In applying the appropriate Contract Clause analytical framework, the Minnesota Supreme Court based the decision below on the first and second parts of the *Energy Reserves* test, and found that:

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[5] According to Petitioners: "They [liquor manufacturers] can claim the Contract Clause overrules the state's power under the twenty-first amendment." (Pet. at 18). To be sure, this obvious overstatement cannot be reconciled with the Minnesota Supreme Court's observation: "Without doubt, states possess large powers to regulate not only the importation of liquor from other jurisdictions, but also its intrastate distribution." (citations omitted) (392 N.W. 2d at 873). As the decision below correctly noted, Anheuser-Busch "acknowledges that states have broad regulatory authority over the importation and distribution of liquor within their boundaries". (*Id.*).

1. The *retroactive* application of the challenged portion of the Act substantially impaired the parties' contractual rights and obligations because the State of Minnesota had never before sought to regulate such contractual rights and obligations in the manner sought to be accomplished by the Act. (*Id.*, at 874).

2. The Act "has all the earmarks of narrow special interest legislation devoid of any broad public purpose" lacking any "significant or legitimate public purpose." (*Id.* at 875).[6]

Because of the absence of any " 'significant and legitimate public purpose' ", the Minnesota Supreme Court concluded it was "unnecessary to address the third part of the *Energy Reserves* test." (*Id.*).

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[6] The Minnesota Supreme Court indeed went further: It determined that Petitioners made "absolutely no showing that the disruption of the contractual expectations of Anheuser-Busch and Saratoga was necessary to meet any important, broad, and general economic or social problem" (392 N.W.2d at 874); and, that the Act "on its face is anti-competitive, [and] contrary to the long standing public policy of this state" which favors the promotion of competition and the restriction of monopolistic power in the business of distributing liquor and beer in Minnesota. (*Id.* at 875).

ARGUMENT

I. THE DECISION BELOW IS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has long recognized that where the judgment of a state court rests on both non-federal and federal grounds, "our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983). The Minnesota Supreme Court clearly reached the decision below on independent and adequate state grounds.

Contrary to petitioners' assertion, the decision below does contain a "plain statement" that it rests on state grounds:

> Accordingly, our answer to the certified question is that the Minnesota Beer Brewers and Wholesalers Act . . . applied retroactively to a preexisting agreement between a brewer and a wholesaler . . . does unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement, U.S. Const. art. I, § 10 *and Minn. Const. art. 1, § 11.* (emphasis added)[7]

(392 N.W.2d at 876).

The Minnesota Supreme Court relied upon Minnesota authorities which recognize the presumption of constitutionality

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[7] The Minnesota State Court's reliance on independent and adequate state grounds clearly distinguishes the present case from those cited by Petitioners. *Michigan v. Long, supra,* 463 U.S. at 1043 (1983) (apart from two citations to the state constitution, "the court below relied *exclusively* on its understanding of . . . federal cases.") (emphasis in original); *New York v. Class,* —— U.S. ——, 106 S.Ct. 960 (1986) (the state court mentioned the state constitution only once, and indiscriminately cited state and federal cases for the same general propositions).

and the absence of appellate deference to the trial court's conclusions of law. (*Id.*, at 872). It based its constitutional analysis on an earlier Minnesota decision which "noted and applied the three-part test enunciated in *Energy Reserves.*" (*Id.*) [8]

Further, the Minnesota Supreme Court relied on its construction of the Act and the contract between Anheuser-Busch and Saratoga, and considered the effect of the Twenty-First Amendment and federal, Minnesota and California decisions construing the effect of the Amendment (the Twenty-First Amendment and liquor industry regulations "may be relevant to the inquiry, [but] they are not dispositive." (*Id.*, at 873)). It also considered Minnesota's Intoxicating Liquor Act, Minnesota's Franchise Act, state and federal decisions considering the constitutionality of retroactive application of other statutes, and prior Minnesota decisions regarding pre-Act common law and statutory remedies. (*Id.*, at 872-874). In reaching its conclusion that "there exists absolutely no showing that the disruption of the [parties'] contractual expectations . . . was necessary to meet any important, broad, and general economic or social problem," the Minnesota Supreme Court relied on a "suggestion" in a federal decision as to the nature and scope of the required public purpose, and the public policies of the State of Minnesota as expressed in previous Minnesota legislation, legislative history, and prior Minnesota decisions. (*Id.*, at 872 n. 11, 874-875).

Considerations of respect for the independence of state courts, and the avoidance of rendering advisory opinions,

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[8] *Michigan v. Long, supra,* 463 U.S. at 1041 ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purposes of guidance, and do not themselves compel the result that the court has reached.").

strongly suggest that the Petition should be denied because the decision below was based upon independent and adequate state grounds.

II. NO CONFLICT BETWEEN STATE COURTS EXISTS.

Petitioners incorrectly assert that the decision below is in conflict with *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 479 A.2d 1191 (1984), as a ground for review by this Court. (Pet. at 11-18).

The decision below correctly observed that the challenged portion of the Act *retroactively* created a statutory civil cause of action in favor of a Minnesota beer wholesaler against a beer brewer which exposed the brewer to liability for compensatory and punitive damages, as well as costs and attorney's fees, for exercising an express contractual right, *viz*, disapproval of a proposed transfer of ownership of the beer wholesaler, under circumstances where the exercise of that express contractual right otherwise "would have afforded no legal recourse" under the contract. (392 N.W.2d at 874). The statutory "unreasonably withhold[ing] consent" provision (Minn. Stat. § 325B.06) was retroactively superimposed on preexisting agreements as the statutory predicate for liability (Minn. Stat. § 325B.15) where a brewer's withholding of consent under its contract with a Minnesota beer wholesaler would give rise to no contractual liability.[9]

Commencing at least with *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38 (1940), this Court, in evaluating the degree of contract impairment, has looked to the extent to

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[9] "All parties concede that in the wholesale equity agreement with Saratoga, Anheuser-Busch reserved to itself the unrestricted right to approve or disapprove any proposed change in the ownership of Saratoga." (392 N.W.2d at 872).

which the industry a party has entered has been "already regulated *in the particular* to which he now objects . . ." (emphasis added). *See Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 242 f.n. 13 (1978); *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at 411 (1983).

In *Schieffelin & Co.*, statutory restrictions on the termination of liquor distributorships preexisted a later legislative reduction in the holding period for "just cause" terminations from twenty-four to six months. In that legislative context, the Connecticut Supreme Court concluded that the claimed contract impairment was neither "cataclysmic" nor "a substantial impairment of the plaintiff's distributorship relationships". (479 A.2d at 1201). The legislation subjected to an unsuccessful Contract Clause challenge in *Schieffelin & Co.* was simply a modification of already existing statutory regulation of the contractual rights between an out-of-state liquor shipper and one of its Connecticut liquor distributors.

The decision below arose from an altogether different legislative context, in which the State of Minnesota had never before sought to regulate, in any manner whatever, the contractual relationships between beer brewers and Minnesota beer wholesalers. (392 N.W.2d at 873, and nn. 12 and 13). While observing that Minnesota's liquor industry, in general, is subject to "pervasive prior regulation" (Pet. at 13), nowhere do Petitioners cite to any prior Minnesota legislation which sought to regulate the contractual relationships between beer brewers and Minnesota beer wholesalers, either in a general fashion or "in the particular" sought to be accom-

plished *retroactively* by the challenged portion of the Act.[10] This significant point distinguishes, and thus reconciles, the decision below and *Schieffelin & Co.*

Simply put, the presence of state regulation of a particular subject matter permits parties to contract with each other in light of the existing regulation. In that situation, as was present in *Schieffelin & Co.*, the magnitude of contract impairment produced by subsequent legislation that further regulated the same subject matter may prove to be acceptably slight. Conversely, the absence of prior state regulation of a particular subject matter, as considered in the decision below, increases the magnitude of contract impairment produced by retroactive legislation to such a degree that it becomes unconstitutional.

Lest there be any doubt on this point, at oral argument before the Minnesota Supreme Court Petitioners' counsel made the following concession in response to the Court's question:

> A JUSTICE: Counsel, what it comes down to is there a judicial determination of whether it's reasonable or not. Up to the point where this act was passed, had, through those long years of regulations, the state regulated the brewers' contractual right to disapprove a wholesaler's proposed change of ownership, had they regulated that?

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[10] The Minnesota Supreme Court rejected Petitioners' arguments, repeated in their Petition (Pet. at 14-16), that Minnesota's franchise laws and a provision in the agreement between Anheuser-Busch and Saratoga satisfied the requisite prior state regulation requirement so as to have reduced the challenged portion of the Act's contract impairment to an acceptable constitutional level. (392 N.W.2d at 873, nn. 12 and 13).

MR. MILHALEK: To the best of my knowledge, Your Honor, no, they had not regulated that particular, ...[11]

III. NO SIGNIFICANT TWENTY-FIRST AMENDMENT ISSUE IS PRESENTED.

Petitioners assert that the decision below is in error because it failed to accord appropriate constitutional significance to the State of Minnesota's Twenty-First Amendment powers in concluding, as it did, that the retroactive application of Minn. Stat. §§ 325B.06 and .08 unconstitutionally impaired the preexisting Wholesaler Equity Agreement between Anheuser-Busch and Saratoga. (Pet. at 7-10). Against the backdrop of numerous so-called "unfair trade practices" the Act defined (Pet. at 8-9), Petitioners assert that the Minnesota Legislature's justification for expressly making the Act *retroactive* was to assure uniformity "to all wholesalers operating in the state, rather than just the new wholesalers" (Pet. at 10) who presumably became such after the Act's effective date (May 28, 1977). Quite obviously, Petitioners have no support for this purported legislative justification, for they cite to none.[12] More importantly, equalizing the ability of Minnesota beer wholesalers to sue beer brewers for violations of the Act is not sufficient justification, in a constitutional sense, for substantially impairing preexisting contract rights between beer brewers and Minnesota beer wholesalers.

Core Twenty-First Amendment interests involve "whether to permit importation or sale of liquor and how to structure

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[11] Trans. Oral Arg. Minn. S. Ct. (May 5, 1986), at 30-31 (Resp. Supp. App., at Supp. A-24); *see also id.*, at 34 (Resp. Supp. App., at Supp. A-26).

[12] *See*, Rule 1.18 of the Rules of the Minnesota House of Representatives and Rule 65 of the Permanent Rules of the Senate, both of which render preserved discussion and testimony before those legislative bodies inadmissible on issues of legislative intent.

the liquor distribution system." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The decision below does not involve issues of whether to permit the importation of liquor, whether to permit the sale of liquor, or the "structure" of the liquor distribution system in Minnesota. Instead, its focus was on the private contractual relationships between beer brewers and Minnesota beer wholesalers in existence when the Act became law.

Anheuser-Busch has never challenged the prospective application of any of the Act's provisions. Only the challenged portion of the Act, Minn. Stat. § 325B.15's express retroactive mandate of the limitations and penalties found in §§ 325B.06 and .08, works a substantial impairment of Anheuser-Busch's preexisting contract right to approve or disapprove Saratoga's proposed ownership transfer to Ribbon. The Minnesota Supreme Court found that the Act "on its face is anticompetitive, contrary to the long-standing policy of the state" (392 N.W.2d at 875), and "appears to be primarily special interest legislation in favor of the wholesaler distributors." (*Id.*).[13] However viewed from a Twenty-First Amendment perspective, Petitioners' attempt to create a justification for the challenged portion of the Act must fail in the ultimate, but in any event, it fails to present an issue of constitutional magnitude under the Twenty-First Amendment worthy of this Court's review.[14]

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[13] *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, 445 U.S. at 111 (1980) ("Nevertheless, this Court accords 'respectful consideration and great weight to the views of the state's highest court' on matters of state law [citation omitted], and we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances.' ").

[14] *Cf., Newport v. Iacobucci, reversed and remanded*, 55 U.S.L.W. 3352 (U.S. Nov. 18, 1986) (No. 86-139) (*per curiam*); *324 Liquor Corp. v. Duffy, prob. jurisdiction noted*, 54 U.S.L.W. 3630 (U.S. Mar. 24, 1986) (No. 84-2022); *South Dakota v. Dole, cert. granted*, 55 U.S.L.W. 3391 (U.S. Dec. 1, 1986) (No. 86-260).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

December 19, 1986.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

State of Minnesota
County of St. Louis

District Court
Sixth Judicial District

File No. 145208

EARL D. JACOBSEN, and ERNEST JACOBSEN, Individually and as Co-Trustees under Voluntary Proceedings for the Voluntary Liquidation and Dissolution of Saratoga Distributing Company; and Ribbon Distributors, Inc.,
Plaintiffs,

vs.

ANHEUSER-BUSCH, INCORPORATED,
Defendant.

ORDER

The Court has previously considered the motion of defendant Anheuser-Busch, Incorporated to dismiss Counts I and II of plaintiffs' Complaint, and denied that motion by Order and Memorandum dated August 19, 1985 (copy attached).

Counts III and IV of plaintiffs' Complaint were earlier dismissed by the Court or voluntarily abandoned by the plaintiffs prior to trial, thereby leaving only the claims pleaded in Counts I and II for trial. Plaintiffs' Count I claims are predicated solely upon defendant's alleged violations of the Minnesota Beer Brewers And Wholesalers Act, Minn. Stat. §§325B.-01, *et. seq.*, effective May 28, 1977. Defendant asserts the constitutional challenge in defense to plaintiffs' Count I claims that the statutes in question, if applied retroactively as expressly mandated by Minn. Stat. §325B.15, would violate Art. I, §10 of the Constitution of the United States and Art.

I, §11 of the Constitution of the State of Minnesota (impairment of contract). Plaintiffs' Count II claim is for punitive damages based on Minn. Stat. §325B.08, or in the alternative, Minn. Stat. §549.20.

The Court has concluded, and the parties concur, that to proceed to a full trial on the merits of plaintiffs' Count I and Count II claims would be wasteful of the Court's time and the parties would be put to undue expense if defendant's constitutional challenge and defense to plaintiffs' Count I claims are meritorious. Therefore, pursuant to Rule 103.03(h), Rules of Appellate Procedure, the Court hereby certifies that the following question, presented by defendant's said motion to dismiss is important and doubtful:

> Does the Minnesota Beer Brewers And Wholesalers Act, Minn. Stat. §§325B.01 *et seq.*, applied retroactively to a preexisting agreement between a brewer and a wholesaler as mandated by Minn. Stat. §325B.15, unconstitutionally impair the parties' rights and obligations set forth in that preexisting agreement under Art. I, §10 of the Constitution of the United States and Art. I, §11 of the Constitution of the State of Minnesota (impairment of contract).

Dated: September 17, 1985.

By the Court:
HON. CHARLES T. BARNES
Judge

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STATE OF MINNESOTA
SUPREME COURT

Case No. C7-85-2105

EARL D. JACOBSEN, and ERNEST JACOBSEN, Individually and as Co-Trustees under Voluntary Proceedings for the Voluntary Liquidation and Dissolution of Saratoga Distributing Company; and Ribbon Distributors, Inc.,

Plaintiffs,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Defendant.

The following transcript contains the arguments of Lawrence C. Brown, Esq., and Joseph J. Mihalek, Esq., before the Minnesota Supreme Court on May 5, 1986.

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MR. BROWN: Mr. Chief Justice, Justices of this Honorable Court and counsel:

The issue presented on this appeal comes from a certified question from Judge Barnes in Duluth and involves the claim by Anheuser Busch that the Minnesota Brewers and Whole-

salers Act which was adopted effective May 28, 1977, constitutes an unconstitutional impairment of the private contract rights between Anheuser Busch, a beer brewer, and Saratoga Distributing Company and its owners the Jacobsen brothers; that contract having been entered into in September of 1976, some nine months prior to the effective date of dispatching [(sic) this statute].

The statute in Section 15 makes clear that it is expressly mandated retroactively because it applies to all contracts between beer brewers and Minnesota wholesalers that were in effect on and after the effective date of the statute, May 28, 1977.

JUSTICE KELLEY: Before you get into further argument, I would like to ask during the course of your argument you explain to this Court what the meaning of that clause in the contract was to the effect that your contract rights and obligations would be subject to the laws of Minnesota as enacted or would be enacted during the term of the contract.

MR. BROWN: Justice Kelley, I am prepared to do that and I will.

By way of very brief background, the Jacobsen brothers decided in 1976 they wanted to get into a business and they negotiated the purchase of the Anheuser Busch Duluth beer wholesalership. That was done with the approval of Anheuser Busch, and they entered into a wholesaler equity agreement which is part of the record in this case.

They operated the distributorship in Duluth for approximately one year and decided they wanted to sell it. They entered into negotiations with another individual who is a named plaintiff, Mr. Kenneth Stretar. He is now dead. He was then the owner and operator of the Duluth Pabst distributorship.

They negotiated a contract for a sale of the business which, under the Wholesaler Equity Agreement, required the express

approval of Anheuser Busch. Approval was sought and rejected on the grounds stated in a letter which is part of the record, I think it's dated January 18, 1977, from Anheuser Busch to the Jacobsens.

About six months later the Jacobsens sold their business, and then in 1979 commenced this action.

As originally commenced there were four counts. By the time we got to trial a year ago in April, all counts had been either dismissed by prior court order or withdrawn on the eve of trial so that there only remained for trial the Count I claim which is premised on the Beer Brewers and Wholesalers Act and the pendent punitive damage claim that is asserted along with it.

Now, the contract, Justice Kelley—since you have asked—let me get right to that. In the Energy Reserves case which is a 1983 U.S. Supreme Court case that dealt with a Kansas statute regulating the price of natural gas, which was enacted after federal legislation, invited the gas and oil producing states to enact legislation dealing with different prices between what was called old gas and new gas.

The Footnote 13 specifically cites and discusses the level of regulation by the State of Kansas over the gas and oil industry as it is conducted in the State of Kansas.

The contract at issue was a contract between a supplier and a public utility, and the opinion of the United States Supreme Court is quite clear that under Kansas law, the level and magnitude of state regulation of the entire natural gas industry is very intense, in fact, I think they use the words, "broad and sweeping," in terms of the regulation.

Your Honor will note that in both the Energy Reserve case and the Allied Structural Steel case, which involved the Minnesota Private Pension Act, in both cases the Veix case is cited—that is a 1940 United States Supreme Court decision—

for the proposition that, in Veix, the critical fact was that the purchaser who was complaining about unconstitutional contract impairment had bought into an enterprise that was already regulated in the particular that he was complaining about.

Now, it is true that the contract here, the Anheuser Busch sale or equity agreement contains a prospective anticipatory clause adopting future state legislation. The reasons why that is not a bar to the constitutional challenge of Anheuser Busch, the reasons, are these:

First, we can find no law even in the Energy Reserves case that says contracting parties in a private contract by such a clause contemplates future unconstitutional state legislation. As a matter of private contract that goes beyond the mutual expectations, we believe, of any contracting parties.

But in addition to that, we have cited to the Court the Nebraska decision, and also the Garris decision out of the Fourth Circuit in which a similar attempt was made to point to state regulations that imposed upon the license there at issue that had been cancelled, certain prospective, anticipatory law changes; and the Court held that when you are dealing with a matter of constitutional magnitude, as we are here, those do not incorporate future unconstitutional changes in the law.

The certified issue under Chapter 325(b) [(sic) 325B] focuses on what, to our view, is the equivalent of legislative bushwacking. Whenever a statute is made to apply retroactively to a matter of private contract, by definition, the agreement of the parties is changed.

Now, the first issue, and the issue on which we failed to prevail before the trial court was in persuading Judge Barnes that the impact of the Beer Brewers and Wholesalers Act on

the contract at issue substantially impaired the rights of Anheuser Busch and that is properly the threshold issue to be viewed.

In the Allied Structural Steel case, the Minnesota Pension Act imposed a $185,000 assessment on the complaining party, Allied Structural Steel, and in that case the Supreme Court said there can be no question of the impact.

In this case, by virtue of the adoption of the Act at issue and its retroactive application, we are here in this Court in a litigated matter where, under the terms of the contract, there would have been no legitimate claim.

It is admitted between the parties, and it has never been at issue, that under Paragraph 4 of the Beer Brewers and Wholesalers Act [(sic) Wholesaler Equity Agreement], as a matter of private contract, Anheuser Busch could exercise its own business judgment when Saratoga and the Jacobsen brothers requested a transfer of the ownership of their wholesalership to Mr. Stretar.

There was a contract claim pleaded, but it was voluntarily withdrawn on the eve of trial, and plaintiffs counsel took the position this is not a contract case. We took the position it never was. It wasn't until the case came up for trial that they agreed with us.

Our principal complaint, and it's predicated primarily on the United States Supreme Court decision in Allied Structural Steel, the Nebraska Supreme Court case we cited you to, and the Garris case out of the Fourth Circuit, is that here we have a statute that was enacted to be effective and applied to preexisting contracts between beer brewers and beer wholesalers in the State of Minnesota. The very act that Anheuser executed, namely, its decision to disapprove Mr. Stretar, could not as a matter of law under the contract have brought Anheuser Busch in as a defendant to the claims being asserted.

The very same Act, by virtue of a statutory overlay on the contract, now means that Anheuser Busch, if the statute is constitutional, must defend itself against the statutory claim which, under the contract, would have given rise to no liability.

In our briefs we cited Your Honors to cases which we believe are directly on point, the most important being the Garris case, the insurance agency case. In that case the insurance company had a contract with its agent but was terminable on 60 days notice without cause. The statute was enacted that created various reasons that had to exist before you could terminate, and in that case the Court held the application of that kind of a statute retroactively would clearly violate the contract clause. We believe we have the identical situation here.

Now, much is made in the plaintiffs brief about the reserve powers of the state under the Twenty-First Amendment. We do not challenge the power of the State of Minnesota under the Twenty-First Amendment to regulate the flow of alcoholic beverages and their sale.

In this particular statute, in Chapter 325(b) [(sic) 325B] there is only one section—.09—that speaks to that exercise of constitutional powers, and that statute says that it prohibits price fixing.

That section is irrelevant to the issues before you in this appeal, that that is clearly the kind of reserve power that we acknowledge the State of Minnesota has over alcohol and beer products sold in the State of Minnesota to prohibit price fixing. I don't think anybody would challenge that.

Going back to the Veix case in 1940 which has been relied upon in the two most recent Supreme Court decisions, Allied Structural Steel and Energy Reserves, the distinction that I see being made by the Court is that in order to get by a substantial impairment, you can make a showing that the con-

tractual relationship being complained about is one in an area where the particular at issue was subject to prior state regulation so that in fairness where the private parties contracted with each other, they were forewarned to anticipate the impact of the statute on their private contractual relationships.

The record in this case, and the briefs submitted in opposition to Anheuser Busch, refer to absolutely no evidence of legislative history of the purposes of the statute, and most importantly, there is no evidence that the State of Minnesota, prior to May 28, 1977, ever sought to regulate private contractual relationships between Minnesota beer wholesalers and brewers.

As a consequence, when the Anheuser Busch Wholesaler Equity Agreement was entered into in September of 1976, neither of the parties were forewarned that the state would at a future date attempt to regulate contractual relationships retroactively.

And, Justice Kelley, coming back to your question, I wish to emphasize that we are not challenging the prospective application of this statute. Those are constitutional issues which are, I am told, being litigated in other cases, and may visit this Court in other appeals.

Our challenge is the contracts clause complaint as to the retroactive application of these statutes to the preexisting contract.

JUSTICE COYNE: Mr. Brown, as I understand both the briefs and my review of the contract, there is no termination date built into the contract?

MR. BROWN: You are correct.

JUSTICE COYNE: In that event, how does the state ever regulate the contract between your client and the Minnesota wholesaler? Do you forever escape regulations?

MR. BROWN: No. No. People don't live that long. These are personal service contracts as the contract specifically states. They change hands. People go in and out of business.

As to any Wholesaler Equity Agreement entered into after the effective date of the statute, the statutory regulations are mandated in light of the effective date of the statute and would apply to future contracts.

This particular contract got changed in the summer of 1978 when the Jacobsens sold to a purchaser who was approved by Anheuser Busch.

JUSTICE COYNE: Wouldn't you be making exactly the same argument if both Mr. Jacobsens had died and their estate had sold this thing to Mr. Stretar?

MR. BROWN: Quite to the contrary. Your question is in two parts, Justice Coyne. Let me take the first part.

There is a provision in the Wholesaler Equity Agreement that permits, without any prior approval of Anheuser Busch, the transfer of the wholesalership business to the heirs or legatees of the wholesaler owners. So that transaction doesn't require any approval of Anheuser Busch. Once that transaction occurs there would be a new contract, and that new contract would have come into existence after the effective date of the statute.

That is the way, in the fact situation that you present to me, that a new contract would be written, and it would be written under the effective statute.

A JUSTICE: I have a little different question that is bothering me a bit. I suppose parties can agree in a contract that they will not be bound by whatever law is passed by the state hereafter. You know, I would certainly agree that in that kind of an agreement, the contracting parties do not contemplate a law that is unconstitutional in its effect.

But here if it's claimed that the law is unconstitutional because it's an impairment of the contract, I don't know if the contract itself made by the parties has eliminated that particular constitutional argument?

MR. BROWN: I think where your question comes from is in the substantial impairment area, and I think you may be suggesting a possibility of a perfect circle here between, I think it's Paragraph 16 of the Anheuser Busch contract, and the constitutional impairment theory. For whatever light I might shed on it, Your Honor, I would say this:

With respect to substantial impairment, as I read the United States Supreme Court cases, one of the focal points is what did the parties contemplate as you would in any contract analysis exercise.

When the parties put in a provision in their contract, as was in the Energy Reserve case, dealing, as I said, with the highly regulated area in a particular area here that they were faced with.

In that case, it is false, if you will, for a party to complain: Hey, my contract is substantially impaired in an unconstitutional sense because I had no forewarning, I had no way of contemplating when I included in my agreement incorporating future state law changes, they were ever going to do this to me.

In our case, Your Honor, and I am repeating myself because I think it bears repeating, there is no evidence—none—of any prior regulation by the State of Minnesota before the effective date of this statute over the private contract relationships between beer brewers and Minnesota wholesalers.

And as we read the Veix case in 1940, as twice relied upon in the two most recent United States Supreme Court cases, unless there is a showing that the state has prior regulation of the particular complained about—and that's not my word,

that's the United States Supreme Court's word—then you can have a substantial constitutional impairment.

Now, here, what is Anheuser Busch exposed to? It's exposed to a statutory claim that didn't exist when its contract was entered into. It is exposed to the fact that what it did, consistent with the contract, is now made apparently illegal by statute.

The claims pleaded include a claim in excess of $50,000 of compensatory damages. There is also a claim under the statute for punitive damages, and there is a claim under the statute for attorney's fees and costs.

Now, when this case was on the eve of trial, and this became—Count I became the only substantive claim left, we immediately moved, first orally and then in writing, for dismissal, asserting our contract clause defense.

The magnitude of the impairment in this case, had the case gone to the jury, if you would have believed the plaintiffs evidence, would have far exceeded the $185,000 which in Allied Structural Steel the United States Supreme Court dismissed in a sentence as saying there isn't even an issue as to impact.

What we have here in our view, if you go beyond the substantial impairment issue, which the District Court felt no need to, is the other two prongs, if you will, of the three-part test, namely, a significant and legitimate public purpose and reasonably appropriate method by which that purpose is implemented, we think it's totally downhill in favor of Anheuser Busch.

This statute contains 17 sections. If you throw out the first and the last, which are definitional and future law, of the 15 that remain, 9 are phrased: Thou shalt not, and are all directed against beer brewers, Entry 8 [(sic) with], no obligations for wholesalers.

The only one that is mutual is that in Subsection 16—it may be 10, my notes are blurred—there is one mutual obligation that each side to the contract shall not interfere with the others freedom of association.

To suggest that this legislation was enacted for any public purpose, in our view, is a mockery of the concept of what constitutes a public purpose.

Unless there be any doubt about that, in the Friend of the Court brief filed by the Minnesota Beer Wholesalers Association at Page 6, they candidly acknowledged that the legislation was, "Enacted to protect a certain class, beer wholesaler."

That is why this legislation was enacted in May of 1977. It's clear on the face of it that is why it's enacted as it was.

There is no promotion of temperance or any other public purpose properly reserved under the police power for state regulation.

In terms of this being reasonable and appropriate, really, all it did at the time was to give Minnesota a beer wholesalers special interest, economic protection legislation, a basis upon which to sue beer wholesalers where they couldn't sue them under existing contracts for breach of contract.

If Your Honors have any questions I would be glad to answer them, otherwise I would like to reserve my time.

A JUSTICE: Let me ask you one question to follow up Justice Coyne's question. Since the contract has no termination date, could go on, as she suggested, forever, you say that is not so because it's a personal contract.

It seems to me in reading this over it's an assignment of the contract. You don't give out a new contract, you just continue the old one and people are substituted.

MR. BROWN: Your Honor, under the terms of the contract, there are provisions for a deficiency termination in Paragraph

5—that is Page 35 of the record—there is immediate termination in Paragraph 6.

(Inaudible question by a Justice.)

MR. BROWN: Then there is a brand new contract entered into, and if it was entered into after May 28, 1977, we wouldn't be here fighting that contract.

(Inaudible question by a Justice.)

MR. BROWN: You will also notice, Your Honor, there is a provision in here for the wholesaler to terminate the contract.

MR. MIHALEK: May it please the Court and Mr. Brown:

My name is Joseph Mihalek. I represent the plaintiff respondents Earl and Ernie Jacobsen.

As the Court knows, this matter is before the Court because the Jacobsens requested that Anheuser Busch consent to the transfer of this Wholesalers Equity Agreement to Ribbon Distributing Company. That consent was denied.

The Jacobsens filed the suit claiming that under the Beer Wholesalers Act—Beer Brewers and Wholesalers Act—Anheuser Busch was not allowed to arbitrarily and capriciously deny the sale and assignment of that contract unless it could show that the prospective buyer did not meet reasonable and material standards established by Anheuser Busch for such transfers.

As with any statute, this statute comes before the Court with the presumption that it is constitutional, and the burden of proof is on the appellant to establish beyond reasonable doubt that it is unconstitutional. We believe that the appellant has failed to meet that burden.

First of all, not all impairments of contract are unconstitutional. The United States Supreme Court, and this Court, have recognized that there are certain impairments, certain statutes which can be adopted which affect and adjust contract

rights, but that does not automatically make the statute an unconstitutional impairment of contract.

The United States Supreme Court in the Energy Reserves case established the government test in 1983 that the Court is to follow in determining whether a statute unconstitutionally impairs a contract, and that's a three-part test.

The first part is to determine whether there is a severe or substantial impairment of the contract rights. We believe that if, that in this case, there is no substantial impairment of contract rights, and therefore the Court need not even address the second and third tests of the Energy Reserves test.

A JUSTICE: The new act creates remedies that did not exist and subjects the brewer to substantially severe financial penalties that would [(sic) would not] have existed had the 50 [(sic)] act never existed. Why isn't that substantial?

MR. MIHALEK: Your Honor, because the severe impairment test, first test of the Energy Reserves case, is premised on some underlying factors. In Energy Reserve the Court determined because the parties were engaged in a heavily regulated industry, they should have expected that the state would continue to regulate in that area.

A JUSTICE: But in this case, according to Mr. Brown, the state has never regulated the relationship between brewers and wholesalers, is that correct?

MR. MIHALEK: We disagree, Your Honor. This contract, which they call a personal service contract, is in essence nothing more than a contract enabling Anheuser Busch, a Missouri company, to import and distribute alcoholic beverages in the State of Minnesota. As such, that contract is subject to the police powers under the Twenty-First Amendment.

The state has established through regulation a system for the distribution and sale of alcoholic beverages in Minnesota.

It's a three-tier system: The brewers on the top, the wholesalers in the middle, and the retailers on the bottom.

The state has by many regulations determined that that system shall exist and has regulated the rights and responsibilities among those three tiers.

A JUSTICE: And you are saying to the Court now the statute permits that system?

MR. MIHALEK: The statute promotes the three-tier system of distribution by preventing brewers from engaging in monopolistic and coercive control over wholesalers.

Brewers are already prohibited from engaging in the retail business. If they are able to coerce and intimidate wholesalers into violating the law or engaging in some type of monopolistic practice, they will in essence gain indirect control over retailers.

They could, if a wholesaler refused to do what the brewer wanted, the wholesaler could be terminated without just cause, and the wholesaler is simply trying to follow the state law.

A JUSTICE: Let's say it would be correct with respect to future agreements entered into after the statute was enacted, how is that involved in this case. The contention of the appellant here is that as applied in this case, the statute was unconstitutional?

MR. MIHALEK: Our responses to that is several, Your Honor.

First of all, the statute was in place before the Jacobsens requested the right to assign this contract, therefore, Anheuser Busch is not in the same situation as existed in the Allied Structural Steel case where they were required to pay out money after the fact, having assumed that they had properly funded their pension.

Here the statute was enacted, the Jacobsens requested the right to transfer the contract, Anheuser Busch had full notice that under the statute they could order their affairs and conduct the review of that request for assignment in light of the statute, establish their own reasonable and material standards and then apply those standards to the request for assignment.

In essence, the statute as applied retroactively does not punish Anheuser Busch for something that it did prior to the time the statute was enacted.

Another reason, Your Honor, is that under the severe impairment test of the Energy Reserves case, the factor which the Court there touched upon very clearly, was that in that case parties had entered into a contract which said that it was subject to the laws, the rules, the regulations in the State of Kansas.

We have exactly the same situation in this case as existed in the Energy Reserves case. Not only do we have an industry which is heavily regulated, but we have a contract which goes even farther than the contract in the Energy Reserves case.

This contract contains a statement that says it's subject to the laws, rules and regulations of the State of Minnesota, and certainly the appellant has argued that simply means they are to follow the laws in the State of Minnesota. We don't deny that.

But it goes farther than that, it's a separate section of Paragraph 16 which says not only is this contract subject to the laws of the State of Minnesota, but we are incorporating into this contract all present and future laws passed by the State of Minnesota which bear upon the contractual relationship between the parties, and it uses the term contractual relationship between the parties.

We contend that's a clear indication that the parties contemplated that the state have the right to regulate that con-

tractual relationship as part of its overall system, overall plan for regulating the scheme of importation and distribution of alcoholic beverages in the State of Minnesota.

Does that answer the question adequately?

A JUSTICE: All right.

MR. MIHALEK: In the briefs, in the reply brief, the appellant makes the statement that the Twenty-First Amendment has little, if any, relevance to this case.

Obviously the Twenty-First Amendment has a great deal of relevance to this case for several reasons.

The State of Minnesota under the Twenty-First Amendment is granted the exclusive right to control the importation and distribution of alcoholic beverages in this state. This statute which defines the rights and obligations between brewers and wholesalers, is simply a small part of that overall statutory scheme for the importation and distribution of alcoholic beverages in the State of Minnesota.

I would like to go back and touch on one other point which relates to Paragraph 16 of the contract. It's a rule of construction that contracts are to be construed against the draftsman if there is any ambiguity in the contract.

There is no question in this case that the contract was drafted by Anheuser Busch, in fact, it's what we call a contract of adhesion. There is no negotiation, you take it or you leave it.

Part of that contract is Paragraph 16 which states that the laws, the rules, the regulations adopted by the State of Minnesota effecting the liquor industry are incorporated within that contract.

That point readily distinguishes this case from the cases relied upon by the appellants, the Garris case, the Wippenfurth case, Allied Structural Steel; because in none of those cases was there such a contractual provision incorporating

laws of the state which bear upon the contractual relationship between the two parties.

As Mr. Justice Simonett correctly pointed out, their argument here is that that provision does not apply in this case because they could not have contemplated that the state would enact an unconstitutional law.

That reasoning is circular and it goes nowhere. They are arguing that that incorporation provision does not incorporate an unconstitutional law, and that this law is unconstitutional because it changes the contract and arguing that it changes the contract because it's not automatically incorporated into the contract.

It's our position that it is incorporated into the contract automatically, and therefore, that there is no impairment of the contract rights. The parties' expectations at the time of contracting were not substantially impaired.

Now, if the Court were to determine that the rights of the party were substantially impaired, we think not, this statute still satisfies the second and third tests of the Energy Reserve case.

That second step in the test is to determine whether the statute furthers a significant and legitimate public purpose.

Here a brief review of the statute will show that the state has enacted a system for insuring fairness and good faith in the dealings between wholesalers and brewers. The statute does not only prohibit the things that Mr. Brown referred to, but prohibits brewers from coercing wholesalers to accept delivery of products not ordered.

It prohibits brewers from coercing wholesalers to perform illegal acts.

It prohibits brewers from fixing prices charged by wholesalers.

It prohibits them from taking retaliatory action against wholesalers who might complain to the applicable state agency that the brewer's violating state law.

It prohibits them from discriminating against wholesalers in pricing.

A JUSTICE: It also prohibits them from entering into an agreement with more than one distributor?

MR. MIHALEK: Yes, Your Honor.

A JUSTICE: It sounds as if it could ultimately be attacked on trust grounds doesn't it?

MR. MIHALEK: Your Honor, it's my understanding that the present system that is employed by Anheuser Busch is exactly that, that they do have exclusive dealerships. We don't believe that's the basis upon which to invalidate this statute in this case simply because the contract between the parties contemplates that the state might enact legislation requiring exclusive dealerships and provides that if the state requires it, this contract is to be so interpreted.

A JUSTICE: Counsel, am I mistaken, what relevance is all that to the issue before the Court today?

The issue before the Court is whether this statute as applied to this contract constitutes a constitutional interference with the right to make a contract, has nothing to do with any of those things you are talking about?

MR. MIHALEK: Well, Your Honor, to answer that question, we refer to the first step in the Energy Reserves test, that the United States Supreme Court has held that if there is no severe impairment of contract rights, the statute is not unconstitutional. In that case the Supreme Court determined that there was no severe impairment of contract rights for essentially two reasons:

The parties, first of all, were engaged in business in a heavily regulated industry. We have the same thing here, the liquor industry is heavily regulated by the State of Minnesota under the Twenty-First Amendment powers.

And the second reason set forth by the United States Supreme Court in Energy Reserves was that the parties had entered into a contract stating that the contract was subject to the laws of the State of Kansas, therefore, the Court concluded that they had contemplated continued state regulation in that area, that they would have to order their affairs in accordance with the state laws.

A JUSTICE: And significant punitive damages, attorney's fees and everything else?

MR. MIHALEK: Well, Your Honor, the legislature—first of all, the legislature has the right to enact legislation which creates causes of action, establishes damages to be awarded in the event someone prevails on a claim for a breach of the statute. It can also take away those rights.

We don't believe it's punitive in this case because the acts of which the plaintiffs complained all took place after the statute was enacted and allowed Anheuser Busch ample opportunity to review this request for assignment in accordance with the law, therefore it's distinguishable from the Allied Structural Steel case.

A JUSTICE: Counsel, you know that it looks to me what this boils down to is this:

Anheuser Busch wants to select who's going to distribute its beer, and that doesn't sound to me like an unreasonable request if you are trying to sell any product, whether it be groceries or beer, you want someone that is going to look out after your business interest whether it's Minnesota, Missouri, Wisconsin, New York or anywhere else.

Now, obviously they have got a provision in there that they want to look at when someone sells a distributorship, who the successor is going to be? They are going to have someone or they are not going to sell their beer in the area.

So I think it's just ludicrous to argue they would unreasonably want to simply agree to a sale to any wholesaler the present wholesaler may want to transfer the business to because if they did that, and they couldn't get a wholesaler, they wouldn't be selling their beer.

Then they get the State of Minnesota coming in and saying now we are going to put this provision in after this contract is entered into, and it seems that the result of the act is that the state can require the brewer to transfer his business, in effect, to a wholesaler who can sell not only his product but maybe sells other products.

Now, how is a brewer going to protect himself against a wholesaler who represents two or three brewers and may decide to push one at the expense of his product?

In other words, putting it another way, what is so unreasonable about this original contract provision?

MR. MIHALEK: Your Honor, first of all, the statute merely requires Anheuser Busch to be reasonable. It allows Anheuser Busch and all other brewers to establish what it believes are the material and reasonable standards to be applied in determining whether to approve that sale of the business.

It's not the state, unlike Globe Liquor, unlike the Nebraska case, it's not the state which sets those standards. It's Anheuser Busch, and as long as the standards are material and reasonable, and the appellant has, in essence, admitted that they currently apply material and reasonable standards, otherwise they wouldn't be able to sell their beer. How can it substantially impair the contract?

A JUSTICE: Counsel, what it comes down to is there a judicial determination of whether it's reasonable or not. Up to the point where this act was passed, had, through these long years of regulations, had the state regulated the brewers contractual right to disapprove a wholesaler's proposed change of ownership, had they regulated that?

MR. MIHALEK: To the best of my knowledge, Your Honor, no, they had not regulated that particular, but we believe under the applicable test in Energy Reserves, you do not have to show that the particular was regulated, only that the industry was regulated.

And furthermore, since this contract is in essence simply a part of an ancillary procedural scheme to import and distribute alcoholic beverages in the State of Minnesota, yes, that aspect has been regulated by the State of Minnesota for years.

A JUSTICE: I would like to have you answer two questions here.

First. Was that clause in the original contract all that unreasonable?

And the corollary is with the statute as now written, obviously it's the intent to enforce them to approve the sale, or the transfer of the distributorship. By doing that they will be dealing with a wholesaler who handles other products as well, isn't that right?

MR. MIHALEK: If the standards established by Anheuser Busch, their material and reasonable standards are such that Ribbon Distributing Company would have met those standards, then they would be dealing with Ribbon Distributing Company. But if Ribbon Distributing Company meets Anheuser Busch's own material and reasonable standards, why should they not do business with Ribbon Distributing Com-

pany? Why should they have the right to arbitrarily veto a transfer without having to give—

A JUSTICE: Why would they want to veto a transfer if it was to their best interest to approve them? Why would they want to veto?

MR. MIHALEK: Your Honor, that is exactly our point since the statute gives them the right to set the standards.

A JUSTICE: I don't think the original contract in a sense allows them to set any standards. There is certainly always a reasonable requirement in there for approving. They can't just, without giving any reasons, I don't see anything that this contract says without any reason at all they can refuse to accept an assignment.

MR. MIHALEK: Well, Your Honor, we believe that, first of all, there is a reasonableness standard implied in all contracts in this state. Certainly the Uniform Commercial Code has a good faith reasonableness requirement. The Franchise Act has such a requirement.

In this case, all the statute seeks to do is to require Anheuser Busch to act reasonably, and as Your Honor suggests, that they would want to do that anyway in order to make sure that the business was being transferred to a good purchaser who is going to do a good job for them, how is the contract severely impaired?

A JUSTICE: Isn't it impaired because before they could do it, now they have to go to Court? You are second guessed by statute?

MR. MIHALEK: They had an opportunity to order their affairs in accordance with the statute. The transaction occurred, the request for assignment occurred after the statute had been enacted.

In summary, Your Honors, we believe that under the first step of the Energy Reserves case, there is no severe impairment of contract.

Under the second and third steps, we believe there is a legitimate and significant public purpose behind the statute, and that the means used by the legislature to accomplish this objective, namely, to require the brewers to act reasonably and in good faith is a reasonable means to accomplish this objective.

Thank you.

MR. BROWN: I will be brief.

Mr. Justice Yetka, Anheuser Busch's reasons are set forth at Page 11 of the appellant's supplemental record. If Your Honor would care to read that letter, that will tell you why Anheuser Busch disapproved the transfer.

Mr. Justice Kelley, if I misspoke, I intended to refer Your Honor and your question to the Energy Reserves case, 459 U.S. at Page 416 and Footnote 22. There the Supreme Court focused on the contract there at issue and said, "Price regulation existed and it was foreseeable as a type of law that would alter contract obligations."

I will not only represent to Your Honors that there is no evidence of prior regulation in the record in this case with respect to the private contractual relationships between beer brewers and Minnesota beer wholesalers, I will represent to Your Honors that I personally know of none outside of the record, and I don't think there have been any.

The argument Mr. Mihalek presents is that Anheuser Busch somehow had an opportunity to react to this statute after its effective date. Obviously it couldn't because when it was made retroactive, it became the statutory overlay on what preexisted and those were Anheuser Busch's contract rights in the only part of the contract that gave it the right to exercise its own business judgment and disapprove.

We would respectfully request that this Court reverse the decision and dismiss this case.

A JUSTICE: Mr. Brown, under your argument you tell us, because we have read for ourselves, that the reasons Anheuser Busch denied the transfer are stated in the record. If I read the contract correctly, there is no necessity on the part of Anheuser Busch to do that, that is purely gratuitous, am I incorrect?

MR. BROWN: Your question, if I may, Your Honor, break it into two parts.

The mechanics of the contract are such that if Anheuser Busch took no action at all, the transfer would go through as approved.

The mechanical vehicle by which it disapproves is the letter of January 18, 1978. I suppose technically under the contract, Anheuser Busch may not have been contractually obligated to say more than, "We disapprove." It went beyond that as the record indicates.

A JUSTICE: Mr. Brown, would you agree or disagree with the statement made that in your contract there would be an implied obligation that Anheuser Busch act reasonably in approving or disapproving?

MR. BROWN: Your Honor, there is a Restatement Contract Second provision that says, and I can't quote you the number, that there is an implied obligation of good faith and oral contracts. I personally reject that. This is my own personal advocacy. That is the law in Montana and it is partly the law in California and other states.

In this state there is no private tort, as Your Honor knows, for bad faith breach of contract starting, I think, with Wild vs. Rarig and coming forward to the 451 Space Center case. At least there is no carte blanche good faith tort theory yet

under the law of Minnesota, and since you are asking me, and I am personalizing, I would strongly advocate against this revolution of the law because what it does, it takes a normal breach of contract case and turns it into a tort case. It brings in punitive damages, and it really causes a lot of problems.

A JUSTICE: Are you arguing, at least in part, one position would be that if there is some implied contractual duty to act reasonably, nevertheless the state law is a substantial impairment because of the added penalties, including the punitive damages it imposes?

MR. BROWN: There would be the added penalties.

Also, Your Honor, the state statute assumes that on its effective date, May 28, 1977, Anheuser Busch then had in place the so-called reasonable standards for the selection of successor wholesalers. There isn't any evidence that Anheuser Busch had such reasonable standards.

What might make a good wholesaler in Duluth, given the products market and ethnic background, might make a lousy wholesaler in Rochester.

So in terms of the good faith aspect of it, while I think that there can be argued that there was a good faith obligation to the extent that was part of the plaintiffs contract case, it was voluntarily dismissed on the eve of trial and never became a part of this case or a part of this record before this Court.

Thank you, Your Honors.

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REPORTER'S CERTIFICATE

I, Earl G. Anderson, do hereby certify that this is a transcript to the best of my ability of the transcription of the electrical sound recording of the arguments in the above-entitled matter which were recorded on May 5, 1986.

EARL G. ANDERSON
Official Court Reporter